Rev. 30 Feb't.
Jan. 22 1880

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~442.~~ 168

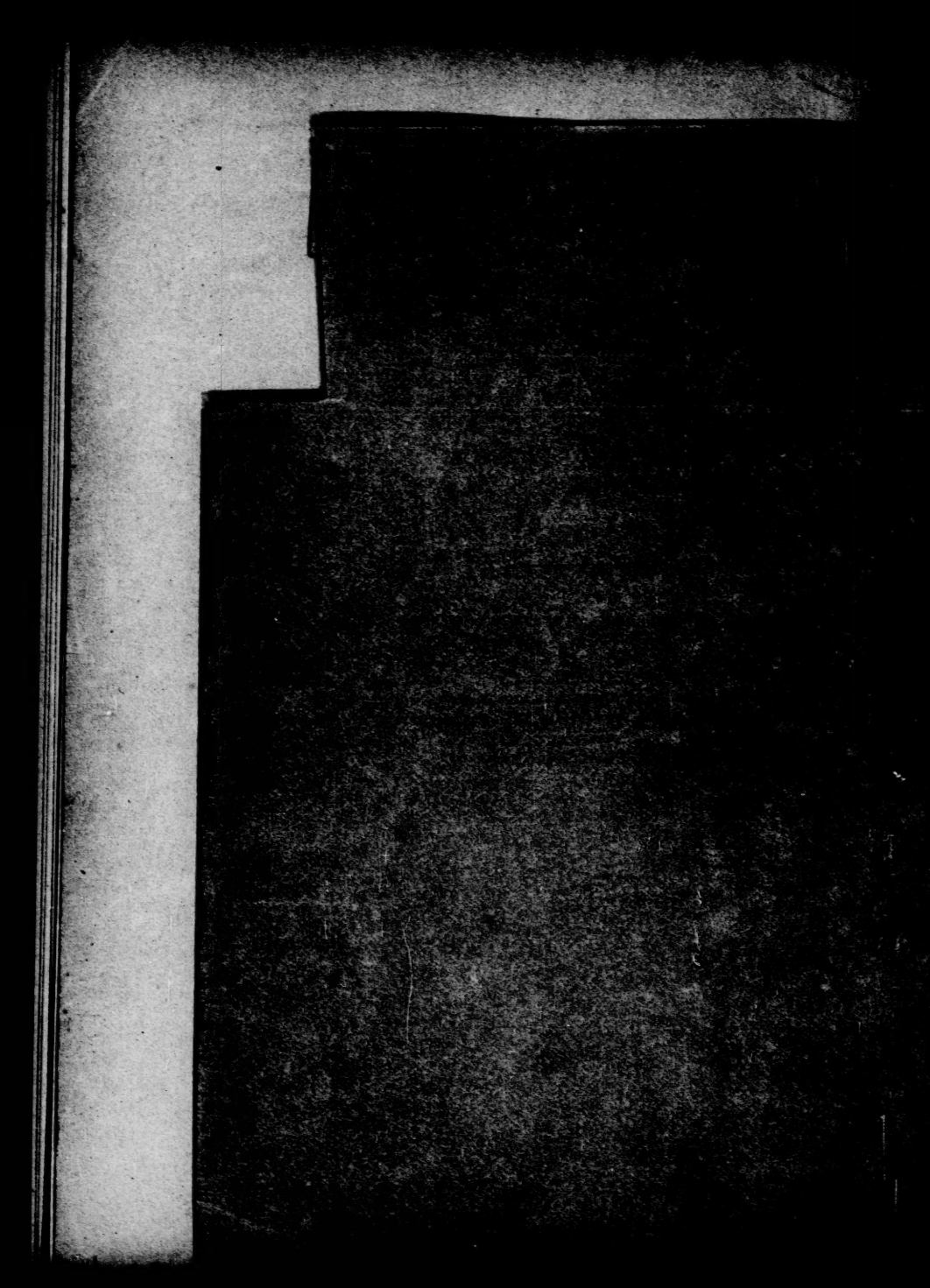
CHARLES J. FOLGER, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 10, 1878.



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1 I. *Petition.—Filed May* 1, 1875.—*J. R.*

United States Court of Claims.

CHARLES J. FOLGER
vs.
THE UNITED STATES. } No. 10381.

To the honorable the court of claims:

The petition of Charles J. Folger, a resident of Geneva, in the State of New York, respectfully shows to your honors—

I. That from the sixteenth day of November, A. D. 1869, until the second day of July, A. D. 1870, both inclusive, your petitioner was assistant treasurer of the United States at New York City, duly appointed and qualified under and in pursuance of the act of August 6, 1846, chapter 90.

II. That as such assistant treasurer he was obliged by the Secretary of the Treasury and the Commissioner of Internal Revenue, under and by vi tue of the internal revenue laws of the United States, to receive from said commissioner large amounts of internal revenue stamps, to safely keep, properly dispose of, and account for the same, and the proceeds thereof, and otherwise to act and do all things needful in the premises; all of which he duly obeyed and fulfilled to his own great anxiety, labor, and risk.

III. That by virtue of section 170 of the internal revenue act, approved June 30, 1864, chapter 173, he was, as he is advised, lawfully entitled to an allowance from the Commissioner of Internal Revenue, upon his sales of such stamps, of the highest rate of commissions
2 allowed by law to any purchasers of ordinary internal revenue stamps. That such rates were duly fixed by the Commissioner of Internal Revenue by regulations dated May 1, 1869, pages 20 and 21, (vide Appendix A), wherein the rate of commissions upon all sales of one thousand dollars or more each was fixed at five per centum. That during the term of office of your petitioner his aggregate sales of such stamps, which were composed of items not less than one thousand dollars each, amounted to the sum of three millions six hundred and forty-nine thousand nine hundred and ninety-eight dollars and thirty-four cents, whereon there accrued to him, as he is advised, as personal allowances and compensation in said matter, the sum of one hundred and eighty-two thousand four hundred and ninety-nine dollars and ninety-one cents, being five per centum commissions on his said sales, which he was by law entitled to receive from the United States.

IV. That under and by virtue of sections 161 and 170 of the internal revenue act of June 30, 1864, aforesaid, and of the provisions of the aforesaid internal revenue stamp regulations of May 1, 1869, pages 22 and 23, (vide Appendix B), the rate of commissions upon sales of internal revenue proprietary stamps, in amounts of over five hundred dollars each, was fixed at ten per centum. That during the term of office of your petitioner, as aforesaid, he received from the Commissioner of Internal Revenue, and sold in amounts exceeding five hundred dollars each, the sum of twenty-four thousand three hundred and forty-five dollars and forty cents of such internal revenue proprietary stamps, whereon there accrued to him, as he is advised, as personal allowances and compensation in said matter, the sum of two thousand four hundred

and thirty-four dollars and fifty-four cents, being ten per centum commissions on said sales of internal revenue proprietary stamps, which he was by law entitled to receive from the United States.

V. That no such personal allowances nor any such commissions or compensation have been made or paid him by the United States.

3 That your petitioner has applied therefor to the Secretary of the Treasury and has been refused.

VI. That there is still due and owing to your petitioner, as hereinbefore stated, the sum of one hundred and eighty-two thousand four hundred and ninety-nine dollars and ninety-one cents, and the further sum of two thousand four hundred and thirty four dollars and fifty-four cents, aggregating the amount of one hundred and eighty-four thousand nine hundred and thirty-four dollars and ninety-five cents, for which sum, by reason of the premises, your petitioner prays your honors to render judgment against the United States.

VII. And your petitioner further alleges that he is a citizen of the United States, and has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided and abetted or given encouragement to the late rebellion against said Government.

CHAS. J. FOLGER,
Post Office Address, Geneva, New York.

T. J. D. FULLER, Washington, D. C., and
HARTLEY & COLEMAN, 51 William st., New York City,
Solicitors, &c.

STATE OF NEW YORK,
County of Albany, ss:

Charles J. Folger, the petitioner aforesaid, being duly sworn, says that no assignment or transfer of the foregoing claim or any part thereof or interest therein has been made; that he is justly entitled to the amount thereof, after allowing all just credits and offsets; and that he believes the facts to be true as stated in the foregoing petition.

CHAS. J. FOLGER.

Sworn to and subscribed this 26th day of April, 1875, before me.

HALE KINGSLEY,
[L. S.] *Commissioner of Deeds.*

4 APPENDIX A.

Regulations for the purchase of stamps.

Revenue stamps may be ordered from this office in amounts of not less than fifty dollars. Purchasers desiring smaller amounts should make application to a collector of internal revenue, or deputy collector, assessor, assistant treasurer of the United States, postmaster, or other dealer in stamps. Payments to this office should be made in the form of *duplicate* certificate of a United States assistant treasurer or designated depositary, of a deposit made on account of stamps. Revenue stamps may likewise be obtained of any national bank which is a designated depositary at the rates of commission at which they are furnished from this office.

They will also be deposited with the assistant treasurers and designated depositaries other than national banks.

General stamps.

The following commissions, payable in stamps, will be allowed in purchases of common stamps:

On purchases of $50 00 or more, 2 per centum.
" " 100 00 " 3 " "
" " 500 00 " 4 " "
" " 1,00 00 " 5 " "

* * * * * * * *

Where the facilities for procuring and distributing stamps are deemed insufficient the Commissioner of Internal Revenue will, on application, furnish to a collector or assessor, assistant treasurer, designated depositary, or postmaster of the United States, a suitable quantity for the supply of the proper district, and will allow the highest rate of commissions allowed by law to any purchaser of common stamps for cash. Such stamps will be furnished under sec. 170 of the excise law, and the officer applying to be furnished with such stamps will give bond, with three sufficient sureties, conditioned for the faithful return whenever so required of all quantities or amounts undisposed of, and for the payment, monthly or otherwise, according to instructions, for all quantities
5 and amounts sold or not reported as remaining on hand. No bond will be accepted for a less sum than five hundred dollars.

Persons to whom stamps shall be furnished under this section will be expected to conform to the following rules:

Agents for the sale of stamps will make return under oath to this office, on form 55, on the first day of each month, of the amount of stamps sold during the preceding month, and of the amount actually on hand and unsold, in each case making separate statements of the amounts of proprietary and general stamps.

Each collector will supply his deputies with adhesive stamps, and sell them to other parties within his district who may make application therefor, allowing the same commission as specified above.

The collector may require such security from his deputies as he sees fit for the stamps placed in their hands, as he alone is responsible, and is to make returns and payment for them to this office.

Orders may be made from time to time for such stamps as are desired, in no case to exceed three-fourths of the penal sum designated in the bond.

Every agent will be charged upon the books of this office with the stamps furnished him, and credited with the amount of each remittance for the sale of stamps, and five per cent. commission on the same.

APPENDIX B.

Proprietary stamps—Schedule C.

Any proprietor of an article named in Schedule C may furnish a design for a stamp, which, if approved, will be engraved by the government engravers at the cost of the proprietor. In such case the proprietor will be entitled to the commissions specified in the 161st section of the excise law, viz, on amounts purchased it one time of not less than fifty nor more than five hundred dollars, five per centum; on amounts over five hundred dollars, ten per centum.

6 II.—*Traverse.*—*Filed May* 24, 1875.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of one hundred eighty-four thousand nine hundred and thirty-four dollars and ninety-five cents ($184,934\frac{95}{100}$), says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

JOHN GOFORTH,
Assistant Attorney-General.

7 III.—*Findings of fact by the court and conclusion of law.*—*Filed Feb.* 25, 1878.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. The claimant was the assistant treasurer of the United States at New York, from the 16th day of November, 1869, to the 22d day of July, 1870.

II. During the whole of the said term of office he was required, under general instructions from the Secretary of the Treasury, to facilitate the distribution of internal-revenue stamps. Sealed packages containing such denominations of stamps as were in most general demand were, from time to time, during said term, placed in his hands, and he was required to sell each package, with the seals unbroken, at its cash value, which in each case was stated upon the package.

Each of the said sealed packages of stamps contained stamps to the amount of the face value of the sum written upon it as above stated, and a further amount of stamps of the kind contained in such package equal to the commission allowed upon it at the above rates.

III. Regulations of the Commissioner of Internal Revenue were in force during the whole of said term, copies of parts of which are attached to claimant's petition, in the words and figures following—

APPENDIX A.

"*Regulations for the purchase of stamps.*

"Revenue stamps may be ordered from this office in amounts of not less than fifty dollars. Purchasers desiring smaller amounts should make application to the collector of internal revenue, or deputy collector, assessor, assistant treasurer of the United States, postmaster, or other dealer in stamps. Payments to this office should be made in the form of a duplicate certificate of a United States assistant treasurer or designated depositary of a deposit made on accounts of stamps. Revenue stamps may likewise be obtained of any national bank which is a designated depositary at the rates of commission at which they are furnished from this office.

"They will also be deposited with the assistant treasurers and designated depositaries other than national banks.

8 "*General stamps.*

"The following commission, payable in stamps, will be allowed in purchases of common stamps:

"On purchases of $50 or more, 2 per centum; on purchases of $100 or more, 3 per centum; on purchases of $500 or more, 4 per centum; on purchases of $1,000 or more, 5 per centum.

* * * * * * *

"Where the facilities for procuring and distributing stamps are deemed insufficient, the Commissioner of Internal Revenue will, on application, furnish to a collector or assessor, assistant treasurer, designated depositary, or postmaster of the United States, a suitable quantity for the supply of the proper district, and will allow the highest rate of commissions allowed by law to any purchaser of common stamps for cash. Such stamps will be furnished under section 170 of the excise law, and the officer applying to be furnished with such stamps will give bond, with three sufficient sureties, conditioned for the faithful return, whenever so required, of all quantities or amounts undisposed of, and for the payment, monthly or otherwise, according to instructions, for all quantities and amounts sold or not reported as remaining on hand. No bond will be accepted for a less sum than five hundred dollars.

"Persons to whom stamps shall be furnished under this section will be expected to conform to the following rules:

"Agents for the sale of stamps will make return under oath to this office, on Form 55, on the first day of each month, of the amount of stamps sold during the preceding month, and of the amount actually on hand and unsold, in each case making separate statements of the amounts of proprietary and general stamps.

"Each collector will supply his deputies with adhesive stamps, and sell them to other parties within his district who may make application therefor, allowing the same commission as specified above.

"The collector may require such security from his deputies as he sees fit for the stamps placed in their hands, as he alone is responsible, and is to make returns and payment for them to this office.

"Orders may be made from time to time for such stamps as are desired, in no case to exceed three-fourths of the penal sum designated in the bond.

"Every agent will be charged upon the books of this office with the stamps furnished him, and credited with the amount of each remittance for the sale of stamps and five per cent. commission on the same."

APPENDIX B.

Proprietary stamps.—Schedule C.

"Any proprietor of an article named in Schedule C may furnish a design for a stamp, which, if approved, will be engraved by the government engravers at the cost of the proprietor. In such case the proprietor will be entitled to the commissions specified in the 161st section of the excise law, viz, on amounts purchased at one time of not less than fifty nor more than five hundred dollars, five per centum; on amounts over five hundred dollars, ten per centum."

IV. During his said term of office the claimant made no special application to be furnished with such stamps, although he was furnished with them in large quantities, as hereinafter set forth. He was not required by the Commissioner of Internal Revenue to give bond conditioned as provided in said regulations, and he gave no bond as to such stamps during that period.

9 V. During said term the claimant sold common stamps to purchasers to the value, at par, of $3,469,477.24, and paid that amount into the Treasury in cash as the result of said sales. Under the said directions of the Secretary of the Treasury and the provisions contained in said regulations, he paid to the said purchasers of said common stamps, in stamps, in manner as aforesaid, commissions on said sales to the amount of $173,277.36: which, added to the above amount of $3,469,477.24, makes an aggregate of $3,642,754.60, which is the entire amount of common stamps, at their face value, which were delivered to the claimant during his said term of office.

VI. During the same period the claimant sold proprietary stamps to purchasers to the value, at par, of $28,914.52, and paid that amount into the Treasury, in cash, as the result of the said last-named sales. Under the said directions of the Secretary of the Treasury and the provisions contained in said regulations, he paid to the said purchasers of said proprietary stamps commissions, in like manner, to the amount of $2,675.02; which, added to the above amount of $28,914.52, makes an aggregate of $31,589.54, which is the entire amount of proprietary stamps, at their face value, which were delivered to the claimant during his said term of office.

VII. The claimant has derived no personal advantage from any of said sales. At the expiration of his said term he settled and adjusted his accounts with the Treasury Department without asserting his right to the commissions which form the subject of this action, or any of them, and the said several payments of commissions in stamps were allowed to him by the accounting officers in said settlement and adjustment.

VIII. Five per cent. on the sales was the highest commission allowed by law or regulation to other persons purchasing said common stamps during said term; and 10 per cent. was the highest commission so allowed to other parties purchasing said proprietary stamps during the same period. Five per cent. on the amount of sales of common stamps sold as aforesaid by the claimant is $173,473.86. Ten per cent. on the amount of proprietary stamps so sold by him is $2.891.45.

ADDITIONAL FINDINGS ALLOWED ON REQUEST OF THE CLAIMANT.

IX. The requirements and instructions mentioned in the second finding were not made or given in any communication between the Secretary and the claimant, but were contained in letters addressed in 1866, by H. McCulloch, Secretary of the Treasury, to H. H. Van Dyck, assistant treasurer at New York, in the words and figures following:

TREASURY DEPARTMENT,
Washington, September 11, 1866.

SIR: It has been deemed proper, as an additional means of facilitating the distribution of internal-revenue stamps, that packages containing such denominations of stamps as are in most general demand should be placed in the hands of the assistant treasurers of the United States and some of the designated depositaries. Printed circulars will be furnished to you, specifying the contents and the cash value of each

package, and the packages are to be sold, with seals unbroken, at such value, which will be stated upon each package. The amounts received from the sale of these packages should be transmitted to the Commissioner of Internal Revenue, in the form of certificates of deposit, daily or weekly, as may be most convenient.

Very respectfully,

H. McCULLOCH.
Secretary of the Treasury.

Hon. H. H. VAN DYCK,
Assistant Treasurer U. S., New York City.

TREASURY DEPARTMENT,
Washington, D. C., July 2, 1866.

SIR: The Commissioner of Internal Revenue has referred to me your recent letter to him in relation to the distribution of revenue-stamps in the city of New York.

I am aware that the cares and responsibilities of your position are burdensome, and I should not think of increasing them were it not for the seeming necessity of so doing.

The adhesive revenue-stamps are all printed in Philadelphia, and it is deemed imprudent to multiply the places of their production. It is indispensable, however, that every facility shall be given by the government for their purchase and distribution.

The consumption of stamps in New York alone is very large, while the amount which is naturally distributed from that city is no small part of the supply for the whole country. It seems to me very advisable, therefore, because of their great value, that they should be kept, as other property of the government is kept, in the possession of the government itself until actual sale.

I am aware that the distribution will require a room set apart, perhaps, exclusively for that purpose, and some additional clerical force, but reasonable prudence and a proper regard for the public convenience, as I have suggested, constrain me to ask your careful reconsideration of the subject.

It may be improper for me to add that the assistant treasurer at San Francisco is employed in the distribution of stamps, and that I am disposed to ask the same service of the several other assistant treasurers in different parts of the country.

Very respectfully,

H. McCULLOCH,
Secretary of the Treasury.

Hon. H. H. VAN DYCK,
Assistant Treasurer, New York City.

X. That the stamps were furnished, supplied, and delivered to the assistant treasurer, the claimant, by the Commissioner of Internal Revenue, to whom the claimant remitted the amounts received from the sale of the stamps, in the form of certificates of deposit, at the close of each week. The claimant did, on the first day of each month, render to the Commissioner of Internal Revenue a return showing the balance of stamps on hand from the preceding month, the amount received during the month, the amount and date of certificates of deposit, the amounts and denominations of payments of commissions to purchasers, and the balance of stamps on hand.

ADDITIONAL FINDINGS ALLOWED ON REQUEST OF THE DEFENDANT.

XI. The claimant during his term of office acted in accordance with the said requirements and instructions without objection.

11 XII. The claimant, during his term of office, also made monthly reports or statements of accounts to said department as to his dealings in stamps. The following is a copy of one of the said monthly reports, and the others were in like form, mutatis mutandis:

"U. S. TREASURY,
"*New York, January 3rd*, 1870.

"*Statement of internal-revenue stamps sold during the month of December*, 1869.

Balance on hand from last account	181,757 51	
Stamps received	510,340	
		$692,097 51
Certificates of deposit, Dec. 4th	68,849 90	
" " " " 11th	102,880	
" " " " 18th	87,953 80	
" " " " 24th	61,823 20	
" " " " 31st	62,372	
		383,878 90
Payment of commissions, at 5 per ct	18,901 44	
" " " " 4 " "	102	
" " " " 10 " "	300	
" " " " 3 " "	9	
		$19,312 44
Balance on hand		288,906 17
		$692,905 51

CONCLUSION OF LAW.

That the claimant's petition be dismissed for the reasons stated in the opinion of the court.

12 *IV. Requests of the claimant for additional findings of fact and the rulings thereon.*

Now comes the claimant, by his solicitors, Hartley & Coleman, and moves the court to find specifically the following facts in addition to those appearing in the findings of the court:

First. That the following correspondence passed between the assistant treasurer at New York, the Commissioner of Intern. Revenue, and the Secretary of the Treasury on the dates mentioned therein, and formed, with the record thereof, a portion of the official archives of the office of the assistant treasurer at New York during claimant's term of office, and constitutes a portion of the orders, regulations, and instructions in force touching the sale of internal revenue stamps and proprietary stamps during claimant's term of office, and shows the facts and circumstances under which the were issued.

UNITED STATES TREASURY,
New York, June 13, 1866.

SIR: Since my interview with you at Washington I have given
13 consideration to the proposition submitted by you for the establishment of a department for the wholesale distribution of stamps in connection with this office. I find that we have not the facilities as to room, safe-keeping, &c., that would warrant me in undertaking the supply which you propose. Besides, I have already so many responsibilities that I am unwilling to add to the weight already imposed upon me, except where necessarily connected with the administration of the finances of the government.

I am disposed to think that you can make a satisfactory arrangement with the National Currency Bank for the distribution of stamps to this section. They have the largest experience of any one in this branch of business, are entirely reliable, and I think would do the business on terms satisfactory to your department.

At any rate, it is out of my power to provide for this branch of service, as the business connected with my more immediate province is daily increasing, and already absorbs my undivided attention.

Respectfully,

H. H. VAN DYCK,
Ass't Treas.

Hon. E. A. ROLLINS,
Com'r, &c.

14 TREASURY DEPARTMENT.
Washington, D. C., July 2, 1866.

SIR: The Commissioner of Internal Revenue has referred to me your recent letter to him in relation to the distribution of revenue stamps in the city of New York.

I am aware that the cares and responsibilities of your position are burdensome, and I should not think of increasing them were it not for the seeming necessity of so doing.

The adhesive revenue stamps are all printed in Philadelphia, and it is deemed imprudent to multiply the places of their production. It is indispensable, however, that every facility shall be given by the Government for their purchase and distribution.

The consumption of stamps in New York alone is very large, while the amount which is naturally distributed from that city is no small part of the supply for the whole country. It seems to me very advisable, therefore, because of their great value, that they should be kept as other light property of the government is kept, in the possession
15 of the government itself, until actual sale.

I am aware that the distribution will require a room set apart, perhaps, exclusively for that purpose and some additional clerical force, but reasonable prudence and a proper regard for the public convenience, as I have suggested, constrain me to ask your careful reconsideration of the subject.

It may not be improper for me to add that the assistant treasurer at San Francisco is employed in the distribution of stamps, and that I am disposed to ask the same service of the several other assistant treasurers in different parts of the country.

Very respectfully,

H. McCULLOCH,
Secretary of the Treasury.

Hon. H. H. VAN DYCK,
Assistant Treasurer, New York City.

TREASURY DEPARTMENT,
Washington, Sept. 11, 1866.

16 SIR: It has been deemed proper, as an additional means of facilitating the distribution of internal revenue stamps, that packages containing such denominations of stamps as are in most general demand should be placed in the hands of the assistant treasurers of the United States and some of the designated depositaries. Printed circulars will be furnished to you, specifying the contents and the cash value of each package, and the packages are to be sold, with seals unbroken, at such value, which will be stated upon each package. The amounts received from the sale of these packages should be transmitted to the Commissioner of Internal Revenue, in the form of certificates of deposit, daily or weekly, as may be most convenient.

Very respectfully,

H. McCULLOCH,
Secretary of the Treasury.

Hon. H. H. VAN DYCK,
Assistant Treasurer U. S., New York City.

Second. That the duty imposed upon the assistant treasurer was new by the act of June 30th, 1864, and was onerous and responsible.

17 Third. That the stamps were furnished, supplied, and delivered to the assistant treasurer, the claimant, by the Commissioner of Internal Revenue, to whom the claimant remitted the amounts received from the sale of the stamps in the form of certificates of deposit at the close of each week. The claimant did, on the first day of each month, render to the Commissioner of Internal Revenue a return showing the balance of stamps on hand from the preceding month, the amount received during the month, the amount and dates of certificates of deposit, the amounts and denominations of payments of commissions to purchasers, and the balance of stamps on hand; and he neither rendered nor was required to render other or different accounts in this behalf, or in behalf of these stamp transactions; and the Commissioner of Internal Revenue kept in his office with the claimant and in his name the accounts pertaining to these transactions.

Fourth. That the gross amount or face value of all the stamps contained in each sealed package mentioned in the findings of the court was marked on the outside of said package as well as the

18 net cash or selling value of the package. That the stamps themselves contained therein were not therein apportioned in fact into stamps and commissions, and that the actual duties, risks, responsibilities, and services were in fact undergone and bestowed in behalf of all the stamps contained in the packages.

Fifth. The total amount of common stamps sold or disposed of by claimant was $3,642,754.60; upon which a commission at five per cent. is $182,137.73; and of proprietary stamps $31,5[illegible]9.54, upon which a commission at 10% is equal to $3,158.95, in all 185.296.68.

Sixth. The cash value of the amount of $173,277 36 in stamps, stated in the fifth finding of the court, is—computed upon a commission of five per cent. upon the aggregate amount such stamps represent and deducted from said face value—equal to $164,613.50; and the cash value of the amount of $2,675.02 in stamps stated in the sixth finding of the court—computed in like manner at ten per cent. commission—is $2,407.52, in all $167,021.02.

HARTLEY AND COLEMAN,
Solicitors for Claimant.

19 Upon the foregoing requests of the claimant, the court made the following rulings to wit:

1. The first request is disallowed in the form requested, but is allowed in the following form.

The requirements and instructions mentioned in the second finding were not made or given in any communication between the Secretary and the claimant, but were contained in letters addressed in 1866, by H. McCulloch, Secretary of the Treasury, to H. H. Van Dyck, assistant treasurer at New York in the words and figures following:

TREASURY DEPARTMENT,
Washington, D. C. July 2, 1866.

SIR: The Commissioner of Internal Revenue has referred to me your recent letter to him in relation to the distribution of revenue-stamps in the city of New York.

I am aware that the cares and responsibilities of your position are burdensome, and I should not think of increasing them were it
20 not for the seeming necessity of so doing.

The adhesive revenue stamps are all printed in Philadelphia, and it is deemed imprudent to multiply the places of their production. It is indispensable, however, that every facility shall be given by the government for their purchase and distribution.

The consumption of stamps in New York alone is very large, while the amount which is naturally distributed from that city is no small part of the supply for the whole county. It seems to me very advisable, therefore, because of their great value, that they should be kept as other light property of the government is kept, in the possession of the government itself, until actual sale.

I am aware that the distribution will require a room set apart, perhaps, exclusively for that purpose, and some additional clerical
21 force, but reasonable prudence and a proper regard for the public convenience, as I have suggested constrain me to ask your careful reconsideration of the subject.

It may not be improper for me to add that the assistant treasurer at San Francisco is employed in the distribution of stamps, and that I am disposed to ask the same service of the several other assistant treasurers in different parts of the country.

Very respectfully,

H. McCULLOCH,
Secretary of the Treasury.

Hon. H. H. VAN DYCK,
Assistant Treasurer, New York City.

TREASURY DEPARTMENT,
Washington, Sept. 11, 1866.

SIR: It has been deemed proper, as an additional means of facilitating the distribution of internal revenue stamps, that packages con-
22 taining such denominations of stamps as are in most general demand should be placed in the hands of the assistant treasurers of the United States and some of the designated depositaries. Printed circulars will be furnished to you, specifying the contents and the cash value of each package, and the packages are to be sold, with seals unbroken, at such value, which will be stated upon each package. The amounts received from the sale of these packages should be trans-

mitted to the Commissioner of Internal Revenue, in the form of certificates of deposit, daily or weekly, as may be most convenient.

Very respectfully,

H. McCULLOCH,
Secretary of the Treasury.

Hon. H. H. VAN DYCK,
Assistant Treasurer U. S., New York City.

And as allowed the IXth finding.

2. The second request is disallowed because not warranted by the evidence.

23 3. The third request is allowed with the exception of the concluding paragraph, beginning "and he neither rendered" &c., and constitutes the Xth finding.

From those words inclusive to the end of the request it is disallowed because not proved.

4. The fourth request is disallowed because not warranted by the evidence.

5. The fifth request is disallowed except so far as the findings asked for already appear.

6. The sixth request is disallowed.

V. Requests of the defendants for additional findings of fact and the ruling thereon.

In addition to the second finding of the court herein the defendants request a finding as follows:

I. The requirements and instructions mentioned in said finding were not made or given in any communication between the Secretary and the claimant but were contained in letters addressed in 1866, by H. McCulloch Secretary of the Treasury to H. H. Van Dyck, assistant treasurer at New York.

24 II. The claimant during his term of office acted in accordance with the said requirements and instructions without objection.

III. In addition to the fourth finding of the court herein, the defendants request a finding, as follows:

The claimant during his term of office made no return under oath to the office of the Commissioner of Internal Revenue, as required by the regulations set forth in the third finding.

IV. In addition to the seventh finding of the court herein, the defendants request a finding as follows:

The claimant during his term of office also made monthly reports or statements of account to the said department, as to his dealings in stamps, in which no right or claim to the commissions which form the subject of this action or any of them was ever asserted.

V. The defendants also request a finding as follows:

The *fragments* of commissions to purchasers by claimant, as set forth in the fifth and sixth findings of the court, were made by him without objection.

THOMAS SIMONS.
Assistant Attorney General.

25 Upon the foregoing requests of the defendants, the court made the following rulings, to wit:

1. The first request is allowed in the form shown in the ruling of the court on the claimant's first request for findings.

2. The second request is allowed, and constitutes the XIth finding.

3. The third request is disallowed because not proved.

4. The fourth request is not allowed in the form stated, but instead thereof the court make the following finding:

The claimant, during his term of office also made monthly reports or statements of account to said department as to his dealings in stamps.

The following is a copy of one of the said monthly reports, and the others were in like form, mutatis mutandis.

U. S. TREASURY,
New York, January 3rd, 1870.

Statement of internal revenue stamps sold during the month of December, 1869.

	Balance on hand from last account....	181,757 51	
26	Stamps received.....	510,340	
			$692,097 51
	Certificates of deposit, Dec. 4th.....	68,849 90	
	" " " " 11th.....	102,880	
	" " " " 18th.....	87,953 80	
	" " " " 24th.....	61,823 20	
	" " " " 31st.....	63,372	
			383,878 90
	Payment of commissions at 5 per c't.....	18,901 44	
	" " " " ½ " "	102	
	" " " " 10 " "	300	
	" " " " 3 " "	9	
			19,312 44
	Balance on hand.....		288,906 17
			$692,097 51

W. G. WHITE,
Acting Assistant Treasurer U. S.

And constitutes the XIIth finding.

27 VI. *Opinion of the court.*

DAVIS, J., delivered the opinion of the court, February 25, 1878:

The claimant seeks to recover in this action the sum of $185,296.68, or such other sum as the court may find to be due him, as commissions upon sales of internal-revenue stamps made by him while assistant treasurer at New York, between the 16th November, 1869, and the 22d July, 1870. He maintains that he is entitled to these commissions under the provisions of the act of June 30, 1864, sections 161 and 170. (13 Stat. at L., pp. 294 and 297.)

The defendants contend that the claimant was required by law, as assistant treasurer, to perform the services for which he now seeks compensation; and that the provisions of statute which are consolidated in sections 1763, 1764, 1765, and 3597 of the Revised Statutes, forbid the allowance of extra compensation therefor; and further, that there is no provision of law for paying the sum claimed, or any sum, for such service.

The office of Treasurer of the United States was created by the fourth section of the act of September 2, 1789. His duties were "to receive and keep the moneys of the United States and to disburse the same."

The act of August 6, 1846 (9 Stat. at L., 59), again defined the duties of the Treasurer (section 6), and provided for assistant treasurers, one of whom was to act in the city of New York, in rooms provided for the purpose and made part of the Treasury by the act, and was to have the custody of said rooms "and of all the public moneys deposited within the same." (Section 3.) He was also required to make transfers and payments of such moneys faithfully and promptly when ordered to do so, "and to perform all other duties as fiscal agent of the government which might be imposed upon him by any act of Congress or by any regulation of the Treasury Department made in conformity to law;" and he was to perform all acts required by law, or by direction of any executive department for paying pensions or making disbursements which any head of a department is required to make, and which are of a character to be made by him consistently with other official duties imposed upon him. The salary of the assistant treasurer at New York was fixed, and it was not only provided that he should not be permitted to charge or receive any commission, pay, or perquisite for any official service of any character or description whatsoever, but it was made a misdemeanor, punishable on conviction by fine or imprisonment, or both, even to lay claim thereto.

In this connection it may be also said that by section 2, act of August 23, 1842, it was provided that "no officer in any branch of the public service, or any other person whose salary, pay, or emoluments is or are fixed by law or regulations, shall receive any additional pay, extra
28 allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatsoever, unless the same shall be authorized by law, and the appropriation therefor explicitly set forth that it is for such additional pay, extra allowance, or compensation."

The series of stringent statutes forbidding extra compensation to officers in government service has been the subject of judicial construction in a number of decisions too well known to require detailed reference. The head of a department is not authorized to require a salaried subordinate to perform duties not germane to those imposed upon him by law. If, however, the subordinate performs such duties, he will not be entitled to extra compensation therefor, unless such extra compensation is definitely authorized by statute. If it be thus definitely authorized, then the subordinate performing the extra service, foreign to his official duties, will be entitled to receive therefor the compensation named in the statute, in addition to the pay which he receives by law or regulation for the performance of the ordinary duties of his office. The decision in this case must be governed by these principles.

The act of 1846 made the assistant treasurer an officer in the Treasury. The duties imposed upon him by the act are to be construed with reference to the objects which Congress had in view in establishing the Treasury. The Treasury Department embraces within its functions the collection as well as the custody and disbursement of revenue. The Treasury itself is the machinery placed at the disposition of the Secretary for the performance of the latter class of duties only.

It is argued that the use of the word "fiscal," in the act of 1846, enlarges the scope of the duties of an assistant treasurer, so as to authorize the Secretary of the Treasury to impose upon him duties connected with the collection as well as with the custody and disbursement of rev-

enue. The word "fiscal" occurs in the sixth section of the act. That section provides in a single sentence for the performance of the duties of various classes of offices, each quite inconsistent with the others, and the adjective "fiscal" is applied to all indiscriminately. It is more reasonable, therefore, to construe it as referable to the fiscal duties of each officer within official limits defined by law.

Hence, it must be assumed that the act of 1846 did not authorize the Secretary of the Treasury to require the assistant treasurer at New York to collect revenue as well as to keep and disburse it. Was any such authority conferred upon the Secretary by the act of 1864?

Section 161 of that act authorized the Commissioner of Internal Revenue to sell adhesive stamps to collectors, deputy collectors, postmasters, stationers, or any other persons, in amounts of not less than $50, upon receipt of payment for the same, and in each case to allow to purchasers commissions upon the aggregate amount of purchases, not to exceed 5 or 10 per cent., according to the kind of stamp. It was evidently the object of this provision to put stamps within reach of persons in all sections of the country by means of direct sales from the office of the Commissioner of Internal Revenue. For this purpose Congress, by offering a bonus of a percentage, sought to make it an object to stationers and other retail dealers to purchase stamps in amounts of not less than $50 as they would buy other articles of merchandise; and waived the general restraining statutory provisions already referred to, in favor of collectors, deputy collectors, and postmasters (which classes of officers were found in all sections of the country, and in contact with all classes of people), in order to induce them also to deal in stamps.

In a subsequent section (section 170) Congress further provides for the distribution of stamps, by authorizing it to be done through
29 the instrumentality of certain public officers without prepayment for the same. The provisions of this section which are material in this case are the following: "In any collection district where, in the judgment of the Commissioner of Internal Revenue, the facilities for the procurement and distribution of stamped vellum, parchment or paper, and adhesive stamps, are or shall be insufficient, the Commissioner is authorized to furnish, supply and deliver to the collector and to the assessor of any such district, and to any assistant treasurer of the United States or designated depositary thereof, or any postmaster, a suitable quantity or amount of stamped vellum, parchment or paper, and adhesive stamps, without prepayment therefor, and shall allow the highest rate of commissions allowed by law to any other parties purchasing the same."

It will be seen that this section does not, in words, impose upon an assistant treasurer the obligation to receive and sell stamps; but we must not necessarily assume that he has the right to decline such a duty if imposed upon him by his official superior. Such a construction would practically nullify these provisions of the act and throw out of gear the machinery provided by Congress for placing the stamps within the reach of those who were required to use them. It is more rational to assume that it was intended by section 170 to empower the Secretary of the Treasury to require an assistant treasurer to sell revenue stamps. Such was, in fact, the practical construction put upon that section by the Treasury Department when the statute was put in operation.

There was no hardship in requiring an officer like the claimant to perform such duties. His official staff was a creature of law, annually fed by means of appropriations. No burdensome personal duty was thrown upon him, nor was his relative responsibility greatly enlarged.

Stamps came to him only, and in such quantities, as they were needed for sale. As they were sold he passed the proceeds in his own office to the credit of the Treasury without handling them. The same process would have taken place had the sales been made by another agent and had the money been paid in to the assistant treasurer under general provisions of law. In either event he would have become, in his capacity as assistant treasurer, the custodian of the money after the sale of the stamps. In this custody of money was his real responsibility.

The claimant entered upon the duties of his office in 1869, five years after the act of 1864 went into effect. If the views which have been expressed are correct, he assumed in taking office to perform the duties imposed upon the assistant treasurer by the act of 1864 as fully as he undertook the performance of those imposed by the act of 1846. Was he entitled to extra compensation for the services rendered under the later statute? He maintains that the act of 1864 explicitly and in full conformity with the requirements of the act of 1842 sets forth the additional pay, extra allowance and compensation which he ought to receive, and that they are the sum demanded in this suit.

The one hundred and seventieth section of the act of 1864 directs the Commissioner of Internal Revenue to allow on sales made in the manner required by that section a commission which, by referring to the provisions of section 161, is found to be 5 per cent. on sales of common stamps and 10 per cent. on sales of proprietary stamps. It is not stated in the statute to whom the commissions named in section 170 are to be allowed. The claimant contends that in his case the commissions should be allowed to him, and cites in support of his proposition two decisions by courts of high authority. (United States v. Cheeseman, 21 Int. Rev. Rec., 340; United States v. Butterfield, 7 Benedict, 412.) If the court in New York has correctly interpreted the act of 1864, the claimant's position is well taken, and it will be our duty to allow to him so much of said commission as may not already have been allowed to him under the provisions of the act.

Section 161 provides for the absolute sale of stamps in amounts of $50 or more to the following classes of officials, viz, collectors and postmasters. It also provides for similar sales to deputy collectors and sundry classes of non-official persons. All purchasers, of whatever class, are to receive a commission on their purchases, at the discretion of the Commissioner, but in no event to exceed 5 per cent. on purchases of common stamps and 10 per cent. on purchases of proprietary stamps.

Among the classes of officials affected by the provisions of section 170, we again find collectors and postmasters enumerated. This section contemplates that they are to be made depositaries of stamps for the purpose of selling them to others, and they are not required to pay for them unless sold or unless not returned to the Commissioner of Internal Revenue when called for. It is with reference to sales under this section that the Commissioner is required to "allow the highest rate of commissions allowed by law to any other parties purchasing the same." If the claimant's construction is correct, the Commissioner must allow postmasters and collectors 5 and 10 per cent. on sales of common and proprietary stamps respectively, made through their agency, while he may allow them less than such percentages on purchases of the like stamps by themselves. It does not seem probable that Congress intended in the same act to offer the same party the greater compensation for the lesser service performed with reference to the same thing.

The more probable and the more natural construction of the provisions of the statute is this: That Congress intended by section 161 to author-

ize officers purchasing stamps in the required quantities, and who otherwise could not accept a commission for doing so, to receive the same bonus which the statute authorized to be paid to other purchasers; and further intended by section 170, in case the machinery provided by section 161 should prove inadequate to place stamps within reach of consumers, then to carry the internal revenue office itself into every district by making the officers named in section 170 the agents of the Commissioner to sell stamps to the classes of officers and to the other persons named in section 161. Sales are to be made by the agents as if made by the Commissioner himself, and commissions are to be allowed to the actual purchaser just as commissions are allowed to the actual purchaser under section 161. The rate of the commission may be varied, but none of it goes to the government official. In this way the apparent conflict between the two sections of the act of 1864 is removed, and proper force is given to the words "other parties purchasing the same."

Hence, we find ourselves constrained to disregard the authorities referred to by the claimant, in so far as they are opposed to our conclusions, and to hold that no statutory provision is made for the payment of a commission to the classes of officers named in section 170. The claimant's right to compensation is therefore controlled by the statutes forbidding him to charge or receive any commission, pay or perquisite for any official service of any character or description whatsoever, or to receive any additional pay, extra allowance or compensation for any service whatsoever.

This conclusion makes it unnecessary to consider the other points discussed at the bar.

The claimant's petition must therefore be dismissed.

31 VII. *Final judgment.*

At a Court of Claims held at the Capitol, in the city of Washington, on the 25th day of February, A. D. 1878, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said petition of the claimant, Charles J. Folger, be dismissed.

32 IX. *Application of claimant for, and allowance of, an appeal.*

CHARLES J. FOLGER
vs.
THE UNITED STATES. } No. 10381.

From the judgment rendered in the above-entitled cause on February 25, 1878, in favor of the defendants, the claimant, by his solicitors, on the first day of May, 1878, makes application for and gives notice of an appeal to the Supreme Court of the United States.

HARTLEY AND COLEMAN,
Solicitors for Claimant.

Filed May 1, 1878.

And now, to wit, May 15, 1878, the application for an appeal filed May 1, 1878, in the cause aforesaid, is allowed as prayed for.

33 In the Court of Claims.

CHARLES J. FOLGER
vs.
THE UNITED STATES. } No. 10381.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the several requests of the claimant and of the defendants for additional findings of fact and the rulings of the court thereon, of the opinion of the court, of the final judgment, of the application of the claimant for the allowance of an appeal to the Supreme Court of the United States, and the order allowing the same.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this second day of July, A. D. 1878.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 442. Charles J. Folger, appellant, vs. The United States. Court of Claims. Filed 10th July, 1878.

FILED
DEC 9 1880

P. F. McBarron, Steam Law and Job Printer, 10 Beekman St., N. Y.

Supreme Court of the United States.

CHARLES J. FOLGER,
Appellant,
vs.
THE UNITED STATES.
Respondent.

October Term, 1880.
No. 168.

Statement and Brief for Appellant.

The appeal in this case is from a judgment of the Court of Claims dismissing the appellant's petition brought in that court for the recovery of commissions allowed to him by law upon sales of internal revenue stamps made by him as agent of the Internal Revenue Department of the Government.

In 1869 and 1870 the appellant was Assistant Treasurer of the United States in the city of New York. This was an office created by the Act of Aug. 6, 1846, "to provide for the better organization of the Treasury, "and for the collection, safe keeping, transfer and dis- "bursement of the Public Revenue." (See 9 Stat. at Large p. 59). This act provided fixed salaries for Assistant Treasurers and specified their duties; but nothing in its terms or meaning required them to perform services having the least resemblance to the duties cast

upon the appellant by the Acts of Congress in the sale of Revenue Stamps, and which Acts are next to be mentioned.

The Act of July 1, 1862 (12 Stat. p. 432) "*To provide internal revenue*" created a new office in the Treasury Department, called the Office of Commissioner of Internal Revenue, for the purpose of superintending the collection of internal duties, stamp duties, &c. This officer was charged (under the direction of the Secretary of the Treasury) with the duty of devising and preparing instructions, regulations, forms, blanks, stamps, and distributing the same, and with all other matters relating to internal duties, stamp duties, &c. (Sec. 1.) By Section 102 of the same Act (vide p. 477) the Commissioner was authorized "to sell to and supply collectors, deputy collectors, postmasters, stationers *or any other* "*persons*, at his discretion, with adhesive stamps &c., "upon payment at the time of delivery of the amount "of duties [which] said stamps &c. represent, and may "thereupon allow and deduct from the aggregate amount "of such stamps as aforesaid a sum of not exceeding "five per centum as commission to the collectors, post-"masters, stationers *or other purchasers*, provided "that no commission shall be allowed on any sum or "sums so sold or supplied of less than fifty dollars."

This Act seems to have made no provision for the distribution of stamps except *by sales direct from the office of the Commissioner of Internal Revenue.*

The Act of Dec. 25, 1862 (12 Stat. 632), is an Amendatory Act in five sections. Sec. 2 authorized the Commissioner to "*furnish and supply* the Assistant Treas-"urers and Collectors of the United States at San Fran-"cisco, California, and Portland, Oregon, with adhesive "stamps, &c., according to the provisions of the Inter-"nal Revenue Law [above mentioned] under such "regulations &c. as he may prescribe and without re-"quiring payment in advance therefor * * provided

" that no greater commissions shall be allowed than is " now provided for by law."

The Act of March 3, 1863, was also an Amendatory Act in many sections (12 Stat. 713). By section 16 (p. 724) it was enacted thus:—

" That in any collection district, where, in the judg- " ment of the Commissioner, the facilities for the pro- " curement and distribution of stamped vellum * and " adhesive stamps are or shall be insufficient, the Com- " missioner is authorized *to furnish, supply and deliver* " to the *collector* of any such district a suitable quantity " or amount of stamped vellum * and adhesive stamps " without prepayment therefor, *and shall allow the high-* " *est rate of commissions to the Collector allowed by law* " to any other parties purchasing the same, and may in " advance require of any such collector a bond with " sufficient sureties to an amount equal to the value of " any stamped vellum * and adhesive stamps which " may be placed in his hands and remain unaccounted " for, *conditioned for the faithful return, whenever so* " *required*, of all quantities or amounts undisposed of, " and for the payment monthly of all quantities or " amounts sold, or not remaining on hand; and it shall " be the duty of such collector to supply his deputies " with, or sell to other parties within his District who " may make applications therefor, stamped vellum * " and adhesive stamps, upon the same terms allowed by " law or under the regulations of the Commissioner, " who is hereby authorized to make such other regula- " tions not inconsistent herewith for the security of the " United States and the better accommodation of the " public in relation to the matters hereinbefore men- " tioned, as he may judge necessary and expedient."

The Act of June 30, 1864. (13 *Stat.* 223) is an act of general revision and amendment of the preceding laws

relating to internal revenue, &c., and contains 182. Sections. Only Sections 161 and 170 are material to the present question.

Section 161 (p. 294) enacts that "the Commissioner "of Internal Revenue be authorized to sell to and "supply collectors, deputy collectors, postmasters, stat- "ioners, or any other persons, at his discretion, with "adhesive stamps, stamped vellum [&c.] in amounts of "not less than fifty dollars, *upon the payment at the* "*time of delivery*, of the amount of duties [which] said "stamps; stamped paper &c., so sold or supplied "represent, and may allow upon the aggregate amount of "such stamps as aforesaid the sum of not exceeding five "per cent. as commission to the collectors, postmasters, "stationers, *or other purchasers* ** *provided* that any "proprietor or proprietors of articles named in Schedule "C. who shall furnish his or their own die or design "for stamps to be used especially for his or their own "proprietary articles, shall be allowed the following "commissions, namely on amounts purchased at one "time of not less than fifty dollars nor more than five "hundred dollars, five per centum; on amounts over five "hundred dollars, ten per centum.

Section 170 (p. 297) enacts as follows: That in any "collection District where in the judgment of the "commissioner the facilities for the procurement and "distribution of stamped vellum; parchment or paper "and adhesive stamps are or shall be insufficient the "commissioner is authorized *to furnish supply and* "*deliver to the collector and to the assessor of any such* "*District and to any assistant Treasurer of the* "*United States*, or designated depositary thereof, or "any postmaster a suitable amount of stamped vellum, "parchment or paper, *and adhesive stamps, without* "*prepayment therefor, and shall allow the highest* "*rate of commissions allowed by law to any other par-* "*ties purchasing the same*, and may in advance require

" of any such collector, Assessor, assistant Treasurer of " the United States or postmaster, a bond with sufficient " sureties to an amount equal to the value of any " stamped vellum, parchment or paper, and adhesive " stamps, which may be placed in his hands and remain " unaccounted for, conditioned *for the faithful return*, " whenever so required, of all quantities or amounts un- " disposed of, and for the payment monthly of all quan- " tites or amounts sold, or not remaining on hand.

And it shall be the duty of such collector to supply " his deputies with, or sell to other parties within his " district who may make application therefor, stamped " vellum, parchment or paper, and adhesive stamps, up- " on the same terms allowed by law or under the reg- " ulations of the Commissioner, who is hereby auth- " orized to make such other regulations not inconsistent " herewith, for the security of the United States and the " better accommodation of the public, in relation to the " matters herein before mentioned, as he may judge nec- " essary and expedient.

And the Secretary of the Treasury may from time to " time make such regulations as he may find necessary to " insure the safe keeping or prevent the illegal use of all " such stamped vellum, parchment, paper, and adhesive " stamps.

The General Revisory Act of June 30 1864 (last above quoted from) was amended in specific points by *the Act of March* 3, 1865 (13 Stats. 469). This Act contains nothing material to the present question unless it be sec. 3 (p. 483) which enacts, that " the gross amount of all duties, " taxes and revenues received or collected by virtue of the " several acts to provide internal revenue, to support " the Government and to pay the interest on the public " debt, and of any other acts that may now or hereafter " be in force connected with the internal revenues, shall " be paid by the officers, collectors or agents, receiving " or collecting the same, daily into the Treasury of the

"United States under the instructions of the Secretary "of the Treasury, without any abatement or deduction "on account of salary, compensation, fees, costs, char- "ges, expenses or claims of any description whatever, "anything in any law to the contrary notwithstanding.

The meaning of the Section here quoted is pointed by the next following section (4) which made an express appropriation out of the Treasury for all the lawful expenses incident to carrying into execution all the provisions of the Internal Revenue Acts, such payment to be made through disbursing agents.

It was proved and found in the Court below, that while the appellant was Assistant Treasurer in New York, and during the period of the performance of the services now in question, certain regulations of the Commissioner of Internal Revenue were in force which are set forth in the record (p. p. 4, 5). In these regulations (see App. A. p. 4) the following points are to be noticed:

1. Revenue stamps can be purchased direct from the Internal Revenue Office in amounts not less than $50. When smaller amounts are desired the purchasers must apply to a Collector, Deputy Collector, Assessor, Assistant Treasurer of the U. S., Postmaster or other dealer in stamps.

2 The following commission [rebates] are allowed to *purchasers:*

On	$50	or	more.....	2	per	centum
"	100	"	"	3	"	"
"	500	"	"	4	"	"
"	1000	"	"	5	"	"

3. "The Commissioner will on application *furnish* "to a Collector or Assessor, Assistant Treasurer, desig-

"nated Depositary or Postmaster of the United States, "a suitable quantity for the supply of the proper Dis- "trict and will allow the highest rate of commissions "allowed by law to any purchaser of common stamps "for cash. Such stamps will be furnished under Sec. "170 of the Excise Law and the officer applying to be "furnished with such stamps will give bond with three "sufficient sureties conditioned for the faithful return "of all quantities undisposed of," &c., &c.,

4. In these regulations the various officers so to be furnished as last mentioned are denominated by the Commissioner "*Agents for the sale of stamps.*" *The form of returns to be made by them is prescribed.*

5. Collectors must "*supply*" their deputies and "*sell*" to other parties within the District who may make applications to buy "*allowing* [on such sales] *the same commissions above specified,*" (meaning that when a party purchases of a collector or deputy he is entitled to the same rebate as if he purchased direct from the Internal Revenue Office).

6. "Every agent" (meaning the officers above designated) is to be charged on the books of the Internal Revenue Office "*with the stamps furnished him and credited with the amount of each remittance for the sale of stamps, and five per cent. commission on the same.*"

After the enactment of the Laws in this statement set forth, the Secretary of the Treasury, by letters to the Assistant Treasurer at New York, under date of July 2 and Sept. 11, 1866, required that officer to become the agent of the Government in the sale and distribution of stamps (Record, p. 11). In the first of these letters he speaks of the advisibility of this measure because the stamps to be placed with the Assistant Treasurer would

still be in the *possession of the Government* until the actual sale.

It also appears (see Record, p. 5) that the commission allowed to purchasers of *proprietary* stamps was 5 per cent. on amounts of not over $500, and 10 per cent. on amounts exceeding $500.

It is found by the record (p. 4) that the appellant was Assistant Treasurer in N. Y. from Nov. 16, 1869, to July 1870, during which period he was required to act as the agent of the Internal Revenue Department in the sale and distribution of stamps. They were furnished to him in sealed packages from time to time, and he was required to sell and deliver each package with the seal unbroken at its cash value, which in every case was marked on the package. Each package, besides the stamps equal to the marked cash value which the purchaser was to pay, contained a further amount of stamps equal to the commission or rebate allowed by law and regulation (as above shown) *to purchasers of stamps* and which the purchaser would in this manner receive and retain. The appellant when he made a sale had only to deliver a package unbroken and receive and account for the cash which he received or ought to receive representing the par value of the stamps less the amount of stamps in the same package representing the purchaser's commission or rebate.

The appellant transacted the business precisely in the manner so directed. During the period aforesaid he sold common adhesive stamps at the cash values so marked on packages to the amount of $3,469,477.24, and paid that amount into the Treasury. But the packages so sold and delivered contained also other amounts of stamps equal to the commission allowed to purchasers, in all $173,277.36, so that his total deliveries on sales amounted to $3,642,754.60. (See Record, p. 6). During the same period the appellant sold and delivered proprietary stamps to the amount of $31,589.54 at the

aggregate cash valuations of $28,914.52, the difference being the rebate to purchasers at the rates specified of 5 and 10 per cent.

Five per cent. commission was the highest rate allowed to purchasers of adhesive stamps. At this rate the appellant's commission as agent would amount to $182,137.73 if reckoned on the total amount of all the packages which he disposed of. But in the findings of the Court below this is reduced to $173,473.86, by not including in the appellant's sales the amounts of stamps representing purchasers' commissions contained in the various packages delivered by the appellant whenever he made a sale. Ten per cent was the highest commission to purchasers of *proprietary* stamps. The appellant's commission on the sales thereof made by him as agent would therefore be $3,158.95. (Record, p. 6).

The appellant made weekly remittances to the Commissioner of Internal Revenue, of all moneys received by him on the sale of stamps in the form of certificates of deposit. He also, on the 1st day of every month, made reports of his transactions in stamps during the preceding month, showing the matters which the law and the regulations required. (Record, 10th finding, p. 7.) A form of one of these reports is on page 8, and all were in the same form. It should be noticed that the commissions therein mentioned, were simply the difference between the marked cash value of the packages and the face or par value of the stamps contained in such packages as delivered to the purchasers, with the seals unbroken. Every report would have shown exactly the same result if it had only charged the appellant with the *cash value* of each package, and had omitted to credit the said commissions or rebates allowed to the purchasers. There was no *act* of payment of such commissions except the mere delivery of the sealed packages on a sale for the cash value, as marked thereon. In point of fact as well

as law, when the appellant accounted for the cash value as marked, of all the packages sold by him, and for packages not disposed of at all, his accounting was complete; because the stamps in *sold* packages, representing commissions, would be in the hands of the purchasers, where they belonged. ***But the reports were in the form dictated, and furnished by the Internal Revenue Department.*** (See Regulations, p. 8 and p. 5 of Record.)

It appears that the business of the agency was so conducted by the appellant that the Government did not sustain the loss of a single dollar or a single stamp.

His account as Assistant Treasurer, at the close of his official term, was settled at the Treasury Department. Of course, when he received monies on the sale of stamps, such monies would be deemed in his custody as sub-treasurer, and would enter into the final settlement to be made by him with the U. S. Treasury. In making such final settlement, he could retain nothing for his commissions without bringing himself under the condemnation of the law. He was imperatively required to account for and pay over all monies received by him, and he could not assert a counter-claim of any name or description. The court below finds that in so settling he did not assert his claims. (7th finding, p. 6.)

The regulations (Record, App. A, last clause, p. 5,) expressly provide that in the books of the Internal Revenue Department "every agent will be charged with the stamps furnished him, and credited with the amount of each remittance for the sale of stamps and ***five per cent. commission on the same.***" But every remittance on account of a package of stamps sold, implied also a credit for the stamps in the same sealed package, representing the commissions of the purchaser, which, according to the same regulations, varied from two to five per cent, according to the amount of the package.

It does not appear that the appellant was ever credited on any books of the Internal Revenue Office, with

the five per cent. commission belonging to himself, although his right to that commission is distinctly stated in the regulations. If it had been so credited, it would be only the evidence of a claim to be paid, like other claims against the Government, out of appropriations made for that purpose.

The appellant has never received his commission, nor any compensation whatever for his services and responsibility as such agent.

The Court below dismissed the petition on the ground, that, although the services in question did not appertain to his official character as Assistant Treasurer, and were extraordinary, yet the statute laws under which he was called upon to render such services, did not provide any compensation therefor. This is the error now assigned

POINTS.

First.

General Observations.

1. The official duties of the appellant as Assistant Treasurer, had no relation to the extraordinary services required of him, and which he rendered, as agent of the Internal Revenue Department, in the sale and distribution of revenue stamps. The office was created by the Sub-Treasury Act, of Aug. 6, 1846 (see 9 Stat., 59), and its duties relate to the "receipt, safe keeping, transfer and disbursement" of the public monies. (Sec. 3.) And although assistant treasurers and a variety of other officers named in that statute, are incidentally mentioned (sec. 6) as "fiscal agents," yet this only means that

each officer named is a fiscal agent according to the nature and duties of his office.

2. The point here insisted on need not be further urged, because it is not only conceded but established by satisfactory argument in the opinion of the Court below.

See also Cheeseman's case, 21 Int. Rev. Record 340.
U. S. *v* Butterfield, 7 Benedict, 412, 418.
U. S. *v.* Morse, 3 Story's Rep., 87.
Converse *v.* U. S., 21 How., 475.
U. S. *v.* Shoemaker, 7 Wall, 338.
Opinions of Att'y Gen'l, vol. 9, p. 496.
Id., 10, p. 438, 446.

3. The appellant, however, concedes that, although his services were extraordinary and of great value to the Government, yet he can not recover compensation unless the Acts of Congress under which the services were called for, in their terms or just interpretation, provided the compensation which he claims. No Department of the Government can allow, and no Court can decree, the payment of monies out of the Treasury of the United States on the mere ground that services have been rendered of greater or less value. There must be a Legislative allowance in some General or Special Enactment.

"The powers of the National Government can only "be executed by officers whose services must be com-"pensated by Congress.

"The allowance is in its discretion. The presumption "is that the compensation given by law is no more than "the services are worth, and only such an amount as "will secure from the officer the diligent performance "of his duties. The officers execute their offices for the "public good. This implies their right of reaping from "thence the recompense the services they render may

"deserve, without that recompense being in any way "lessened except by the sovereign power from whom "the officer derives his appointment * and no dimin- "ution in the recompense of an officer is just and lawful "unless it be prospective, or by way of taxation by the "sovereignty who has a power to impose it, and which "is intended to bear equally upon all according to their "estate.

"The compensation of an officer of the United States "is fixed by a law made by Congress. It is in its ex- "clusive discretion to determine what shall be given. "It exercises the discretion and fixes the amount and "confers upon the officer the right to receive it when it "has been earned."

Dobbins *vs.* the Com'rs of Erie Co., 16 Pet., 449–450.
7 Wallace, 338, 21 How., 475, *supra.*

4. The true question in this case therefore is, whether the Statute Laws authorized the services for which compensation is claimed, and provided for or allowed a special compensation therefor. But the preceding observations lead up to a rule in the interpretation of these Statutes which is of decisive importance if, and only if, reasonable doubts arise as to the true intent and meaning of the legislative expression. Governments are assumed to be just and reasonable. Especially is this true of the law making power. It is therefore always to be presumed in advance, that when the Legislature requires of the servants of the Government services of a new and extraordinary character, services for which no compensation is provided in the existing law, it will provide for such compensation; and the intention so to provide will be predicated of the Legislative Acts, if it can be without violence to the language in which they are enacted. This rule of interpretation has the sanc-

tion of authority, and we are entitled to its influence, if necessary, in the further consideration of this case.

U. S. *v.* Morse, 3 Story, 87, and other cases *supra*.

Second.

Legislative Acts.

We come to the direct consideration of the Acts of Congress, which, so far as bearing on the present inquiry, are quoted at large in the preceding statement; and we say that these Acts very plainly provide for the compensation which the appellant claims. The Statute to be principally considered is that of June 30, 1864, revising all former Acts relating to Internal Revenue. But the antecedent Statutes are *in pari materia* and therefore a proper subject for reference.

The Internal Revenue system, including stamp duties as a part of that system, had its origin in the Act of July 1, 1862. The office of Commissioner of Internal Revenue was created in the Treasury Department; and the Commissioner, under the authority of the Secretary as the head of the Department, was given ample authority to prepare stamps, blanks, forms, instructions, regulations, and to issue and distribute the same. Stamp duties were a novelty in our revenue system, and Congress in this Act seems not to have thought of any other method of placing the stamps within the reach of the citizens or taxpayers who were compelled to pay for and use them, than a direct sale from the office of the Internal Revenue Commissioner without any intermediate agency. Accordingly the Commissioner was authorized

to sell them as a species of property created by the Government, to collectors, deputies, postmasters, stationers, and *other persons*, for cash payment, and he might allow a commission or rebate from the face value to the purchaser of not exceeding five per cent, if the amount exceeded fifty dollars. (See Sec. 102 of the Act as quoted, *supra*).

The Commissioner, under his power to make regulations, could fix the rebates within the maximum limit, and they appear to have been fixed at from 2 to 5 per cent, *increasing with the amount.*

See regulations, Record, p. 5.

Nothing in this original Act required any duties to be performed by the Assistant Treasurers of the United States in reference to stamps, or placed them in any connection whatever with the system of stamp duties; and this is a fact of some significance, to show that the duties of Assistant Treasurers, and the distribution of stamps, were subjects without relation to each other.

Doubtless the reason of rebates to purchasers in round lots or quantities from $50 upwards, was, 1st, to furnish a motive for buying and keeping on hand stamps, as consumers or smaller dealers might need them; and 2d, to compensate for the cost and risk of keeping quantities, exposed as they were to theft, embezzlement and loss; and doubtless, also, the reason for the ascending scale of rebate was the greater exposure, as the quantity was greater.

It may be assumed that a brief experience suggested that increased facilities were needed in order to supply the people of the remote Pacific States with stamps. Accordingly, in a short Act, amendatory of the Internal Revenue law, passed Dec. 25th, 1862, it was provided (Sec. 2) that the Commissioner be authorized "*to furnish* "*and supply* the Assistant Treasurers and Collectors at

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It may be assumed that a brief experience suggested that increased facilities were needed in order to supply the people of the remote Pacific States with stamps. Accordingly, in a short Act, amendatory of the Internal Revenue law, passed Dec. 25th, 1862, it was provided (Sec. 2) that the Commissioner be authorized "*to furnish* "*and supply* the Assistant Treasurers and Collectors at

"San Francisco, California, and Portland, Oregon, with "stamps, *according to the provisions of the Internal* "*Revenue Laws*, under such regulations, etc., as he "may prescribe, without requiring *payment in advance* "*therefor*," and with a proviso that "no greater commission be allowed than is now provided for by law." There is nothing in any preceding or following sections of the Act to explain this provision. We think a credit *sale* of stamps to the Assistant Treasurers and Collectors, at the two places named, was contemplated, because that and that only would be "in accordance with the provisions" of law then existing. The Commissioner could fix the *time of credit* by regulation, as well as the rebates within the maximum limit already "provided for by law," i. e., five per cent.

But the material point in this short enactment is, that until then Assistant Treasurers had nothing to do with the distribution of revenue stamps, and that in this very first statute, which brought them into this new relation *a special compensation was provided* for their new duties, new risks, and new responsibilities. If Congress supposed that Assistant Treasurers and Collectors of Revenue could rightfully and properly be employed to keep on hand and distribute stamps without special compensation, then why did this particular Act so plainly allow to Assistant Treasurers and Collectors in the Pacific States the same rebate as on sales to other purchasers in round lots? It certainly did not then occur to the legislative body that Assistant Treasurers might be rightfully charged with the duty of receiving, keeping, selling and distributing stamps without any compensation at all.

It must be assumed that further experience developed the insufficiency of the merely selling arrangements, so far made, as the means for distributing the stamps in all places, and that such experience led to the amendment embraced in the Act of March 3, 1863. (See this amendment

quoted at large in the statement, *supra.*) Before this, Collectors of the revenue could buy stamps from the Internal Revenue Bureau, at Washington, like private persons, and could furnish them to consumers. But except in the collection districts of San Francisco and Portland, pre-payment in cash was required, and for this and other reasons the system was found inadequate.

Therefore in this Act of March 3, 1863, an amendment was introduced (Sec. 16), which allowed the Commissioner to determine that the means of distribution in any District in the United States were inadequate to supply the wants of the people, and in such District to constitute an agency through the *revenue collector* of such District, by the deposit of stamps with him for sale, he being accountable for the safe keeping and return of all stamps undisposed of, whenever required, and being also required to pay monthly for all stamps sold by him, as well as for all not sold, unless accounted for as *remaining in his hands.* It was expressly made his duty to supply his deputies with stamps to be sold, and to sell them to other persons. *The same Section, in the most exact terms, allowed to the Collector a commission equal to the highest rate allowed to purchasers under the pre-existing law, which was five per cent.*

The observations material to the present question which are suggested by this act are these:

1. This amendment repealed nothing and left all existing arrangements for distribution in full force. Collectors, like any one else, might still purchase, under the original act of 1862, stamps on *cash payment*, from the Internal Revenue Office. But the Commissioner might also resort to this new instrumentality of agencies in Districts where he should judge it expedient. Indeed nothing would prevent the same collecter from purchasing stamps on his own account, and becoming also a

selling agent for the Goverment under this addition to the law.

2. This amendment distinctly centemplated *agencies.* The stamps when delivered to the Collector did not become his property, but, until sold by him, remained the property of the United States, although at the end of every month the collector was bound to pay for all stamps "sold, or not remaining on hand," i. e., for all stamps Sold or Missing. The Commissioner could terminate the agency at any time and recall the stamps unsold or he might let the agency go on, requiring the agent once a month to pay for all stamps which might have disappeared although not sold.

3. It was assumed that a Collector receiving stamps as a selling agent would receive them in such large quantity or amount that a purchaser buying the same amount direct from the Goverment under the previous law would be entitled to the highest rebate or commission. Therefore the commission to the Collector *as agent* was provided for at the highest rate, the intention being to make his compensation as selling agent the same as it would be if he or any one else purchased the same amount of stamps.

4. By anticipation, it may now be further said that sec. 170 of the Revising act of 1864 (to be considered further on) upon which this controversy directly depends, is only an enlargement of the policy of the Statute just examined, by including assistant Treasurers, assessors, designated depositaries and postmasters of the U. S. in the same category as Collectors. That is to say, by turning these other offical persons also into agents for the sale of stamps in the discretion of the Commissioner of Internal Revenue, *and upon the same basis of compensation as the collectors.*

The Revisory Act of June 30, 1864.

We come to a consideration of this Statute which was in force when the services in question were rendered. The Act is a general revision of the antecedent laws relating to Internal Revenue, including stamps and the distribution thereof. In relation to the means of distribution we shall find the changes extremely slight and none whatever in respect to rebates and compensation to purchasers or to agents for sale. Everything is included in the Sections 161 and 170 (quoted supra).

Section 161 is simply a re-enactment of the Section 102 of the original act of July 1. 1862 providing for *direct sales* of stamps to Collectors, deputy collectors, post masters, stationers and all *other persons* wishing to purchase for cash. The assistant Treasurers of the U. S. and the Assessors of Internal Revenue are not named either in the original or in this revised Section, but certainly they could purchase as "other persons." The same rates of discount, rebate or commission, are allowed in both the original and revised enactments. In short, the original language is closely followed in every respect now material. It scarcely needs to be observed again that the means of distribution thus provided *were cash sales* at a discount (called a commission) from the Internal Revenue Department without the intervention of any agency

But the same policy, already observed upon, which dictated the employment of agencies in such parts, and only in such parts, of the United States as the Commissioner should determine upon for the purpose of a more efficient supply of stamps, and which led to the enactment of Section 16 of the Act of March 3, 1863, was strictly adhered to and carried into the revising section 170 of the Act of 1864 now referred to. The policy was moreover enlarged and extended by the authority given to employ as agents, not only the *Collectors*, as pro-

vided in the original Act, but also *Assistant Treasurers*, Assessors of Revenue, designated depositaries and postmasters of the United States. Accordingly, it will be seen that the revisory Section is precisely a re-enactment of the existing provision on the same subject with the addition of other official persons to be employed as agents. With this exception, the original language is closely followed throughout, and the interpretation is the same, unless the omission of certain words to avoid tautology (to be noticed further on) has turned the revisory section into something radically and fundamentally different from the original, and totally reversing its policy in respect to compensation.

It may be useful to observe in passing, although the matter is not of special importance, that the particular enactment of Dec. 25, 1862 (supra), authorizing stamps to be supplied to Assistant Treasurers and Collectors at San Francisco and Portland is ommitted in the Revisory Act of 1864. The manifest reason is, that all the purposes of that particular Statute are fully answered by the section 170 of the revisory Act which applied to all parts of the United States where the Commissioner should deem special facilities necessary.

Third.

The Interpretation of the Statutes.

It is not difficult now to see, as a whole, the scheme or plan of distributing stamps as it originated, progressed and took its final shape in the general revisory Act of 1864.

1. It began in Sec. 102 of the original Revenue Act of July 1, 1862, providing for *cash sales* of stamps to col-

lectors, deputies, stationers, and anybody else who wanted to buy and would pay cash for stamps. It was quite indifferent who should buy, because the Government received its revenue by selling the stamps. They might be used, burned up, or lost. If not used by the purchasers or others who might buy or steal them from the purchasers, so much the better for the Government, because more stamps would have to be bought, the use of them being imperative.

To induce persons to buy from the Government and to compensate for trouble and risks, a rebate, called a commission, was allowed on a scale ascending from 2 to 5 per cent according to quantity or amount, but with no rebate if the amount was less than $50.

The scheme as thus commenced was slightly supplemented Dec. 25, 1862, by giving to Assistant Treasurers and Collectors, at two points on the Pacific Coast, the special privilege of buying stamps without pre-payment. *But the rebate or commission was the same.* This Act disappeared altogether when the more ample provision for *agencies* in any part of the United States was adopted.

2. According to the scheme as thus originated, stamps (with the slight exception just named) did not leave the Internal Revenue Department, where they were created, without the payment of cash. The inefficiency of the system, real or supposed, first suggested the employment of *Revenue Collectors* as agents to sell for the Government in collection districts, where the Commissioner should think that measure necessary, in order to insure to the people the proper supply of stamps. Accordingly, Section 16 of the Act of March 3, 1863, was enacted, authorizing *Collectors* so to be employed. And, inasmuch as any Collector so employed would have the custody and sale of stamps in large lots, and must rigidly account for every stamp whether sold or

not, his compensation was distinctly allowed by the Statute at the highest rate (5 per cent) which the Commissioner could allow to purchasers directly from the Revenue Department.

3 Thus the scheme of distribution came to have two principal features or parts; one a direct sale of stamps by the Internal Revenue Office for cash, with rebates to purchasers, increasing as the amount and risk increased; the other, the deposit of stamps with *Collectors* as agents for sale, wherever deemed expedient, and sales by them and their deputies *with a commission distinctly allowed to them equal to the highest rebate to purchasers direct from the Revenue Department.*

4 The system in both these features was carried into the General Revisory Act of June 30, 1864. Section 161 of that Act was simply a re-enactment of the original Sec. 102 of the Statute of July 1, 1862, relating to direct sales for cash with rebates to purchasers; while Section 170 of the same Act is a re-enactment of Section 16 of the Statute of March 3, 1863, authorizing stamps to be deposited with Collector *as agents*, with a commission to them, but enlarging the policy of that Act by placing *assistant treasurers, revenue assessors, postmasters and designated depositaries* of the U. S. in the same categeory as the Collectors, with the same allowance of commission to all these official persons, if so specially employed. *These are the commissions now claimed by the appellant*, who, as Assistant Treasurer, was employed as such agent and sold stamps to the value of several millions.

SECTION 170, ACT JUNE 30, 1864.

The adverse decision of the court below invites to a closer criticism of *the language* of this enactment. The

written opinion of the court ignores the history and makes no account of the general scheme and policy of the laws which have been referred to. This Section, in its original form, as Sec. 16, of the Act of March 3, 1863, after providing that the Commissioner may furnish the *Collector* of any District with stamps for sale, proceeded to say "and shall allow the highest rate of commission *to the Collector* allowed by law to any other parties purchasing the same." In the *re-enactment*, as Section 170 of the Revised Act of 1864, Assistant Treasurers, Assessors, Postmasters, and designated Depositaries, are included with the Collectors as official persons who may be employed in the same manner; but when the revisers had got thus far with the Section, and came to the matter of allowing commission, then, instead of tautologically repeating the words "Collector, Assistant Treasurer, Assessor, Postmaster, and designated Depositary," they said simply and without repetition, "and shall *allow* [omitting the words 'Collector, Assistant Treasurer,' etc.] the highest rate of commission allowed by law to other parties purchasing the same." The Section then proceeds like the original from which it is taken.

Now, to our apprehension, the meaning of the two enactments is so clearly the same, that we are at a loss for argument to make it plain. The two statutes relate to the same subject, and the same branch of it. If a reason must be given for the existence of the last Statute, it is not found in any purpose to change the law, but in the circumstance that Congress, in 1864, was engaged in a general and complete revision and re-enactment of all the Internal Revenue Laws. Statutes *in pari materia*, are held to mean the same thing, unless the contrary is clearly expressed. But what have we here to indicate the fundamental change assumed by the court below, which finds (see opinion, Record, fol. 30, pp. 16, 17,) that not only is the commission in question not allowed to the

Collector, Assistant Treasurer, etc., *but is allowed to the persons who might purchase from them?* This commission is given in exact words "to the Collector" in the Act of 1863. But, with nothing whatever to indicate a change of intention, the court below holds that the revised section of 1864 not only *takes it away from the Collector*, and denies it to the other official persons included with him in the list of agents, *but actually gives it to purchasers.*

The commission is certainly *given* by the Statute. But to whom? The court below answers by saying thus: "Sales are to be made by the agents [meaning the Col- "lector, Assistant Treasurer, etc.,] as if made by the "Commissioner himself, and commissions are to be allow- "ed to the *actual purchasers*, just as commissions are "allowed to the actual purchaser under Sec. 161." The Statute, in its very words, rejects this theory. The Commissioner "shall allow the highest rate of commission allowed by law *to other parties* purchasing the same," i. e., purchasing stamps. "Parties" "other" than whom? *Manifestly other than the Collectors, Assistant Treasurers, etc.* Therefore the allowance is to them by the necessary force of the word "*other.*" Therefore these official persons who are to be supplied as agents for sale, are to have the highest commissions allowed by law to "other" parties who (instead of being agents) purchase stamps. The court below assumes, as we do, that Collectors, Assistant Treasurers, etc., are to sell as agents. What, therefore, can all this mean, unless it be that they are to have the highest allowance given to persons other than agents, who purchase?

Again, the commission or rebate to *purchasers* is discretionary with the Internal Revenue Commissioner, so that it do not exceed five per cent. (Sec. 161.) But the commission which he *must peremptorily* allow to somebody under Sec. 170, is the *highest* rate, i. e., five per

cent, and this seems to be exact demonstration that the commission here provided for, and the discretionary rebate (fixed at 2 to 5 per cent.) to purchasers, are not and cannot be the same thing.

But the same Section contains another clause which also appears to remove all excuse for misinterpretation. Immediately following the authority to employ as agents the officers named, with a positive direction to allow a commission equal to the highest rate allowed to purchasers, and with authority to take a bond from them, the Section proceeds to require the Collector to supply his deputies (who thereby became a part of the agency force), "and to sell to other parties who may make application "therefor, stamped vellum, parchment, or paper and "adhesive stamps *upon the same terms allowed* by law, "or under the regulations of the Commissioner." The words "allowed by law" of course refer to the previous section 161, of the same Act, re-enacted from the original section 102, of the original Act of July 1, 1862, providing for the case of direct sales of stamps without any agency. Thus we find this Section 170 making a *special provision* for rebates to purchasers from the Collector, as agent, on the same basis as upon direct sales without any agency; and this we take to be actual demonstration that the other commission, previously, in the same Section, allowed to somebody, is allowed to the agent himself. *The two allowances cannot be the same thing. One is to the agent, the other to purchasers from the agents. One is 5 per cent. peremptorily as the highest rate, the other is 2 to 5 per cent. in the discretion of the Commissioner.*

So much for the language of the Section (170) itself. But we can look both backward and forward for further proof of the legislative intention. As we have already seen, section 170 is a re-enactment of Sec. 16 of the previous act of March 3, 1863 which allowed this very com-

mission *to the Collector* as selling agent in such exact words as to admit of no criticism or doubt. Next we look forward. All these laws were carried into the general Revision of the Statutes of the United States, 1873-1874. The same plan and scheme of distributing stamps is there re-enacted. The Section 102 of the Act of July 1, 1862, relating to direct sales and the sliding scale of rebates thereon, re-enacted as Sec. 161 of the revision of 1864, is now Section 3425 of the Revised Statutes: while Section 16 of the Act of March 3, 1863, in which these agencies originated, re-enacted as Section 170 of the same revisory Act of 1864, is now Section 3427 of the Revised Statutes and is as follows:

"Section 3427. In any collection district where, "in the judgment of the Commissioner of Internal Re- "venue, the facilities for the procurement and distribu- "tion of stamped paper and adhesive stamps, as pro- "vided in this chapter, are insufficient, the Commissioner "is authorized to supply to *collectors, assistant treasur- "ers of the United States, designated depositaries and "postmasters*, without prepayment therefor, suitable "quantities of stamped paper, as aforesaid, and of *ad- "hesive stamps* as required by this chapter; and he may "in advance require of any such person a bond, with "sufficient sureties, in an amount equal to the value of "any such stamped paper or stamps which may be "placed in his hands and remain unaccounted for, con- "ditioned for the faithful return of all quantities or "amounts undisposed of, and for the payment, monthly, "of all quantities or amounts sold, or not remaining on "hand. *And He Shall Allow to Such Persons* the high- "est rates of commissions allowed to any other parties "purchasing such stamped paper or stamps. It shall "be the duty of such collector to supply his deputies "with, or to sell to other parties within his District who "may apply therefor such stamped paper and adhesive

"stamps upon the same terms allowed by law or under "the regulations of the said Commissioner."

Upon the letter of this enactment not the slightest doubt can arise that collectors, assistant treasurers, &c., under the designation of "such persons," would take the very commission now disputed. The matter as said above, is equaly plain upon the letter of the Act of March 3, 1863. It is incredible therefore that Congress had a totally different intention in the intermediate Act of 1864. Put the three enactments side by side, examine them all, and we think all minds will agree that they all mean the same thing. As to the first and the last of these Statutes, it does not appear from the opinion of the Court below that it ever saw or heard of them.

If the Court below had attended to the Act of March 3, 1863, and to the section 3427 of the Revised Statutes above quoted, surely it could not have made the following observations which are the actual and only ground assigned for its extraordinary interpretation of the Act of 1864. The court says (Record, page 16, folio 30):

"It is with reference to sales under this section [sec. "170, Act of 1864] that the Commissioner is required to "*allow* the highest rate of commissions allowed by law to "any other parties purchasing the same. If the claim- "ant's construction is correct the Commissioner must "allow postmasters and collectors five and ten per cent. "on sales of common and proprietary stamps respective- "ly, made through their agency, while he may allow "them less than such per centages on purchases of the "like stamps by themselves. It does not seem probable "that Congress intended in the same act to offer the "same party the greater compensation for the lesser "service performed with reference to the same thing."

Now confessedly Congress did this improbable thing in reference to the *Collector's* commission in the Act of

March 3, 1863, and did it also in the "same act" to wit the Revised Statutes of 1873-4, sec. 3427 in reference to *Collectors, Assistant Treasurers, Assessors, postmasters* and *designated depositaries.* Therefore it is not only not improbable, but in the highest degree probable that Congress would do the same thing in Sec. 170 of the Act of 1864, the meaning of which is now directly in question. Certainly the supposed improbability disappears when the fact is shown, and with it disappears the sole ground of the decision now under review.

Some Observations on the General Question of Interpretation.

It seems to us that the Court below has greatly misconceived the subject in its assumption expressed in the language last quoted that the selling agents performed a service to the Government less onerous and less important than the purchaser of stamps, and in the further assumption that it is hence improbable that the Statutes intended to give any compensation at all to such agents.

A kindred mistake is found in the following observations of the Court (pp. 15–16):

"There was no hardship in requiring an officer like "the claimant to perform such duties** No burdensome "personal duty was thrown upon him nor was his rel- "ative responsibility greatly enlarged. Stamps came to "him only, and in such quantities as they were needed "for sale. As they were sold he passed the proceeds "in his own office to the credit of the Treasury without "handling them. The same process would have taken "place had the sales been made by another agent, and "had the proceeds been paid in to the Assistant Treas- "urer under general laws. In either event he would

" have become, in his capacity as Assistant Treasurer, " the custodian of the money after the sale of the " stamps. *In this custody of the money* was his real " responsibility."

To such views of the learned Court there are several answers.

1. We cannot characterize these views as pertinent argument, because the real question is whether Congress by its legistation has or has not granted the allowance to the several agents mentioned, and not whether they fully earned it. (U.S. *v.* Fisher 2 Cranch 280. Marshall, *C. J.*)

2. It is absolutely plain that if the assistant treasurers are not entitled to the commission, Collectors and assessors are not. But the reason assigned for not allowing it to Assistant Treasurers totally fails as to Collectors and Assessors, because they are not depositaries of money.

3. The illustration, by supposing that some other agent. (say the collector of a district) had sold the same stamps and paid the money in to the assistant Treasurer, is unfortunate because the assistant Treasurer selling them himself must, as agent, before covering the proceeds into the Sub-Treasury, incur the same risk and take the same care of the stamps and the proceeds thereof *as such other agent.* Therefore it is not a question of the appellants responsibility as Sub-Treasurer in keeping and disbursing the money, *but as selling agent of stamps.* His duties and responsibilities as Sub-Treasurer began precisely at the point where his service and risks as stamp agent ended.

4. These views of the Court below are directly opposed to the views upon which it must be assumed that

the Legislative power acted. Not the slightest question exists that Congress in the Act of March 3. 1863 and in the Revised Statute of 1873-4 did in precise terms grant the very compensation now claimed to the various official persons named as selling agents, and it is only by mere baseless criticism and assumption that the Court has held the Revisory Act of June 30. 1864 to have a contrary meaning. *But the views of the Court below are equally and diametrically opposed to the other Acts now referred to in respect to whose meaning no doubt exists.*

5. But is there in fact any truth in the assumption that these official agents, so far as employed; did not earn the commission granted by the Statutes upon grounds at least as cogent as those which governed the legislature in granting the allowances to the purchasers of stamps? Suppose the Sub Treasurer or Collector or any one else had purchased $100,000 or $1,000,000 of adhesive stamps, as they might have done, from the Revenue Office for cash. The property of course would vest in them. and any loss would be their loss. The risk and trouble of keeping stamps on hand in larger quantities and selling to smaller dealers and to consumers would be their risk and trouble. But if instead of *buying* they received *as agents*, kept on hand and sold in numerous parcels the $1.000.000 of stamps under absolute accountability to the Government for the face value of every stamp, does not their claim to the commission stand in reason and equity (as well as in the letter of the Statute) upon exactly the same ground as if they had been purchasers instead of selling agents? It scarcely needs to be repeated that in the terms of the Statutes as enacted in 1863, 1864, and 1873-4 these agents were made peremptorily accountable for every stamp which came to their hands.

6. There is no force in the suggestion that the commissions given by the Statutes to the agents of the Government in addition to the rebate to purchasers result in the loss of revenue. The stamps had no *intrinsic* value. Their revenue value consisted in the compulsory use of them by consumers, and the measure of value in every case depended on the nature and character of the writing or proprietary article to which they must be affixed. They were worth to the Government the face thereof less whatever it might cost to place them within easy reach of the people in every part of the country. It would have been intolerable tyranny to compel the use under severe penalties without diffusing them at Government expense through every portion of the community. Congress, therefore, proceeded upon a wise and just policy manifested in the laws referred to.

7. And there is still less force in the suggestion that the Legislature could not have intended that any official person to be employed as agent could earn so large a compensation as the appellant claims. On this point the legislative power had no intention at all. What it did intend was to give the Commissioner a discretionary power to employ these agents in those Collection Districts where the other modes of distribution were found inadequate, and what *it further intended was to give a fixed commission on the amount of the agents' transactions* within his employment. This is a rule of business common to all commission agencies. If the head of the Internal Revenue Department, in acting upon this rule, saw fit, instead of diffusing the business in many hands, to accumulate it largely in the hands of the appellant, the result shows the wisdom of that employment.

What has been said above in regard to the greater exposure to loss as the amount of stamps held in custody, handled and disposed of, was larger, need not be here repeated. But the point can be illustrated by what hap-

pened to the appellant's immediate successor in office, whose transactions of the same character resulted in a loss to him about equal to the whole amount of the appellant's commissions. It required a private Act of Congress to relieve him.

> See Act for the relief of Mr. Hillhouse. Statutes, ch. 48, private Acts (March 5, 1874), 18th Stats., Part 3, p. 532.

8. There is nothing incongruous or unreasonable in the postulate that Congress intended both to allow a commission to the Government agents and a rebate (called a commission) to purchasers in lots of more than $50 *from agents*. The general purpose was to place the stamps in lots of $50 and upwards in the hands of dealers where consumers could find them. Dealers would not buy of the agents at par, because in buying, holding and selling to others there was danger and loss without compensation. Hence the rebates allowed to purchasers, whether direct from the Internal Revenue Office or from agents. But the Government, as the proprietor, found itself unable to establish retail dealings in all parts of the country so as to meet all the requirements of its policy. Hence the institution of these agencies, under conditions which subjected the agents to precisely the same labor, risks and responsibilities as purchasers. The Commissioner might require a bond to ensure exact accountability. That provision of the law implied the responsibility of the agent, whether the bond was actually taken or not. (15 Wall, 337, 347; 10 Peters, 364, 365). In short, the situation of the agent involved the same peril and exposure as if he were himself the wholesale purchaser and dealer in the stamps. Therefore, while on the one hand the Government ensured its revenue, whether through direct sales for cash or by agencies, it was a necessary and inherent feature of its policy to

allow compensation to the agent as well as the dealer, to the dealer as well as the agent.

9. The most indefensible of all conceivable interpretations of the Statutes is, that which suggests rather than affirms, that the commissions given to the official agents cover only the *difference* between the maximum of five per cent and the graduated rebates allowed to purchasers, in other words, that the allowance to purchasers must be taken out of the agents' commissions. This construction does not seem to us to have the merit even of plausibility. We think it enough to say that the Statutes allow both a commission to the agent and the rebate to the purchaser, and so that argument concedes. But the two allowances are by perfectly distinct and independent provisions, and there is nothing in the reason of the thing or on the face of the Statutes which can be appealed to as affording the least color for an interpretation, which, while conceding the agents' commissions, in effect denies and destroys them by a counter charge of equal amount, or which may be of equal amount, in the discretion of the Commissioner of Internal Revenue. Indeed, if the agent is to pay the rebate to purchasers out of his commissions, why should the Government step in to regulate those rebates, after being assured of its revenue by holding the agent and his sureties responsible for every stamp?

THE REGULATIONS AND ACTS OF THE COMMISSIONER.

These regulations are in the record, (p. 2. and same p. 4). They must have been issued after the Revisory Act of 1864 because they name as agents the official persons mentioned in Sec. 170 of that Act The first part of them relates to and is based upon the Statute regulating direct sales of stamps from the Internal Revenue

Office, to wit, sec. 102 of the original act of July 1, 1862, re-enacted as Sec. 161 of the Revisory Act of 1864; and in this part the commissions or rebates to purchasers *under these Sections* are fixed at from 2 to 5 per cent. All the remaining part relates to the *agencies* provided for in sec. 16 of the Statute of March 3, 1863, re-enacted and extended in sec. 170 of the Revising Act of 864, but contains no reference at all to any commission or rebate to be allowed to *purchasers from the agents*, unless the agent happened to be a *collector*, in which case he was directed to allow to purchasers from him the same commissions as before specified on direct sales from the Revenue office. If the agent was an assistant Treasurer or an assessor no such direction was given and no provision appears for any such allowance. The closing paragraph is in these words: "Every agent will be charged upon "the books of this office with the stamps furnished him, "and credited with the amount of each remittance for "the sale of stamps *and five per cent commission on* "*the same.*"

Now this language renders it extremely plain that the Commissioner interpreted the Statutes as peremptorily allowing to all the designated agents a commission of five per cent on sales. While on this point there can be no doubt, yet the prescribed method of bookkeeping, if followed, appears to defraud the *Collector* of his commission or the greater portion thereof, by not crediting him with the rebates which he was directed to make in favor of purchases from him. In regard to other agents, i. e. assistant treasurers, &c., no such allowance to purchasers is prescribed. If the business was correctly transacted by them, and if the books were kept in the manner stated, they would always show a balance in favor of an assistant Treasurer for his commissions on sales to be paid by the Treasury Department out of appropriations made by Congress. In the appropriation bill provision was always made for paying all the ex-

penses of executing the Internal Revenue laws: For example, see the appropriation, Statute of March 3, 1865, 13 Stat. 483 sec. 4, and the general appropriation Acts of March 3, 1869, 15 Stat. 290; and of 1870, 16 Stat. p. 238, 239, the two last covering the period in which the appellants services were rendered.

The regulations referred to, probably issued soon after the revising Act of June 30, 1864, were an attempt on the part of the Commissioner to carry into execution the laws of Congress, as re-enacted in that revision, in reference to both methods of distributing stamps. It appears to have been a confused and imperfect attempt, because while correctly recognizing the right of *all agents* to five per cent commission on sales, it failed to recognize any *credit* in favor of *Collectors* for the *compulsory rebates* which they were directed to make in favor of purchasers and because, in reference to Assistant Treasurers, &c., the regulations contain no such direction and are totally silent.

The record does not show that any other regulations were ever issued, nor do they show any acts or practice on the part of the Commissioner until we come to the case of the appellant in 1870, when, as to him, we find a practice in force which we may assume was the same as to all agents, and was more exact in its results. As the record finds, the appellant was furnished with stamps in sealed packages on which was marked a *cash value* which the purchaser was to pay being less than the par value of the stamps, with direction to *deliver the packages with the seals unbroken*, so that the purchasers would thus receive their graduated allowances in the difference between the stamps and the marked cash value.

Exactly thus the appellant transacted the business of his agency, obeying the directions of his superior officer. He also made monthly reports in the form prescribed to him in which he is charged with the *total amount of*

stamps, credited with remittances of the cash values of packages sold, with the allowances to purchasers represented by the excess of stamps over the cash values, (this performance being called *commissions paid out by him*), and also credited with the stamps remaining on hand but without any credit for the appellants own commission of five per cent. Thus each monthly report was a balanced account, *with the appellants' commission omitted from the statement.*

We suppose that so far as the appellant is concerned all this was perfectly correct in result, because under the existing law, (See Act of March 3, 1865, 13 Stat. 469, 483, Section 3 and 4, quoted in statement *supra*) the right of the appellant to commission could not be mixed up with his official accounts, but was an independent claim to be separately asserted and to be paid out of appropriations like other debts of the Government.

It is, moreover, a feature of the case to be noticed that the Court below finds (see finding 7, p. 6) that the appellant, on retiring from office, "settled his accounts "at the Treasury Department without asserting his "right to the commissions which form the subject of "this action or any of them, and the several payments "of commission in stamps were allowed to him by the "accounting officers in such settlement." The Court in its opinion predicates no conclusion upon this finding, but we think it deserves a brief consideration as follows:

1. "*The several payments of commissions in stamps* were allowed," &c. This appears to be a finding altogether perfunctory and meaningless. What is called a *payment*, most graciously and benignantly allowed to the appellant, was simply the delivery of sealed packages to purchasers with the seal unbroken, the said packages containing a certain amount of stamps in excess of the marked cash value. In this mode the Commissioner of Internal Revenue thought proper to allow the rebates

which he himself had established in favor of such purchasers. The appellant had nothing to do with such a transaction except to receive the packages from the Commissioner for sale, keep them, find purchasers, deliver the packages, and account for the money received as the marked cash value. The Commissioner fixed the rebates, placed in sealed packages the stamps, and directed the appellant to deliver such packages. It was so much a matter of necessity to allow the appellant for these so-called payments, if he was charged *with all the stamps* in a package, that the finding of the Court seems pointless and without the least force. It certainly can have no effect upon the vital question whether the appellant was entitled to his own commission on sales. The allowance made by the Commissioner *to purchasers*, and paid by him in the peculiar manner just pointed out, surely has no connection with that question.

2. *The settlement at the Treasury without asserting the claim now in question*: The finding of this fact seems to be equally useless. As we have already seen, the accounts between the appellant and the Government in respect to this agency *never included his own claim to commissions*. It was an account exactly balanced every month (see the form of his reports as prescribed by the Commissioner) by charging on one side the par value of all stamps and crediting him with cash proceeds of sales according to the marked value of the packages sold, also with the stamps in excess of the marked value delivered over by him in the same packages to the purchasers, and with the stamps remaining on hand. It is, of course, to be assumed that, when he went out of office, all the stamps had been sold, or else that those remaining were returned to the Government by passing them over to his successor or otherwise, as would be shown by his final report.

The final settlement at the Treasury was, therefore, only the formal summing up and balancing of a detailed account, always balanced once a month, and balanced at the close, but never including the appellant's personal claim, which was a simple debt owing to him by the Government. It is believed to be the custom, upon the closing of an official service, for the accounting clerks or officers of the Treasury Department to state and adjust the account of the retiring officer or agent without his personal presence or intervention. If the appellant was present when this adjustment was made, which is not probable and certainly is not found, he could then demand payment of his debt, or not demand it, as he pleased. He could postpone the matter, if it suited him, and call for payment at his own will and pleasure. He had nothing to do with the bookkeeping of the Internal Revenue or the Treasury offices. He made his balanced reports monthly in the form prescribed to him by due authority, and if his personal claims were not blended in his accounts, it is because they could not properly be so blended. By inflexible Statute Law he was bound to pay over all monies received by him without deduction and if at any particular point of time he did not bring forward and assert his legal right to payment for his services he is not on that account any less a creditor of the Government.

The Aggregate Amount of the Commission Claimed.

The record shows (p. 6) that the total amount of common stamps received by the appellant and disposed of in the course of his agency was $3,642,754.60. The cash proceeds of his sales and paid over by him were $3,469,477.24, and $173,277.36 was the amount of stamps which, under the direction of the Commissioner, he delivered to purchasers without cash; both sums making

the $3,642,754.60 The total amount of proprietary stamps received and disposed of by him was $31,589.54, of which $2,675.02 went to purchasers without cash, leaving cash sales $28,914.52.

Five per cent on the total amount of common stamps is.....	$182,137 73
Ten per cent on the total of proprietary stamps is.....	3,158 95
Aggregate commissions	$185,296 68

The court below, if it had allowed the claim at all, would, as appears from the record, have reduced the amount by confining the commissions to the cash proceeds of the sales, and on this basis of computation, the result would be:

Commission on common stamps,.....	$173,473 86
" " proprietary "	2,891 45
Aggregate.....	$176,365 31

That the larger sum in the true claim will appear by reference to the Statutes quoted upon which the rebates and commissions are predicated. The original act of July 1, 1862, sec. 102, relating to direct sales of stamps and the re-enactment of that section as Section 161 of the revisory act of 1864, provided in terms for an allowance to purchasers of rebates (called commissions) upon the "*aggregate amount*" *of the stamps* "sold" and "supplied." The Commissioner was to fix the rates within the maximum of five per cent.

The Act of March 3, 1863, sec. 16, in which the plan of distribution by *agencies* originated, directed the Commissioner to allow to the Collectors, the only agents then contemplated "*the highest rate of commission allowed*

by law" to purchasers. And, as we have seen, this was re-enacted as sec. 170 of the revision of 1864, in force when the services in question were rendered and afterwards as Section 3427 of the Revised Statutes. Both these re-enactments, like the original law, declare in exact terms that the allowance to agents, (assistant treasurers &c., being added to the list) should be "*the highest rate of commissions*" allowed by law to purchasers.

Now, the highest rate of commission allowed by law to purchasers was five per cent on the *aggregate amount of stamps* sold and furnished to them, and the conclusion would seem plain that agents for sale were entitled to that per centage on the aggregate amount of stamps furnished to and disposed of by them. It is a commission, not on the cash values or prices marked upon the packages nor on the proceeds of sales, but on the *stamps* at their *aggregate amount.*

The peculiar methods of the Commissioner in directing the transactions of the appellant do not determine this question. But in point of fact he furnished packages of stamps, each containing a certain amount at their par or face value. He marked a smaller sum as the sale or cash value, and directed the whole package to be delivered to the purchaser, the stamps in the same package being undistinguished and indistinguishable from each other. In exact legal result this was a sale of the package at a discount, and names and formulas of speech cannot make it anything else. The purchaser got the stamps and the Government got its price. That was all. But by Statute law the appellants commissions are not upon the price but upon "*the aggregate amount of stamps furnished and supplied.*

In Conclusion: In this brief an effort has been made, perhaps with unnecessary elaboration and care, to bring into view the entire scheme and policy of the Govern-

ment in reference to this particular branch of its revenue, to clear away whatever obscurity may attend the subject, to explain the statutes in their relation to each other and in their most natural and easy interpretations, and to show the reasonableness and equity of those interpretations. But the great and only question after all is, what is the meaning of a few words in the written Law? If this has been made sufficiently plain in the sense we contend for there are no other laws which can stand in the way of the appropriate judgment in favor of the claim of the appellant.

The integrity and capacity, the exactitude in affairs, which have marked and distinguished his public career, were qualities demanded by the situation in which his services were rendered. The services were of great value to the Government, and the compensation claimed is perfectly just, if the Laws have provided for it. If they have not so provided, it can not be recovered, however just.

The Judgment of the Court below should be reversed, and the proper judgment pronounced in the appellant's favor.

WALTER H. COLEMAN,
GEO. F. COMSTOCK,

of Counsel for Appellant.

OFFICE SUPREME COURT U. S.
FILED
DEC 22 1880
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 168.

CHARLES I. FOLGER *vs.* THE UNITED STATES.

BRIEF FOR THE UNITED STATES.

This case raises the question, whether section 170 of the act of June 30, 1864, (13 Stat., 297,) gives *double* commissions upon the sales of stamps thereby authorized; *i. e.*, *one* to the officer selling, and *another* to the purchaser?

This section, as well as the *context* afforded by section 161 of the same act, (13 Stat., 294,) are quoted in the brief submitted by the learned counsel for the appellant.

The opinion of the learned court below assigning reasons for rejecting this claim is upon page 13 of the Record.

It is submitted as evident that in section 170, as in section 161, but one commission is allowed.

S. F. PHILLIPS,
Solicitor General.

Laws of 1864 Sec. 143

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 420.

LEOPOLD BAMBERGER, PLAINTIFF IN ERROR,

vs.

GEORGE E. TERRY, RECEIVER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED MAY 25, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 420.

LEOPOLD BAMBERGER, PLAINTIFF IN ERROR,

vs.

GEORGE E. TERRY, RECEIVER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

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1 Circuit court of U. S. *court* of the district of Connecticut.

GEORGE E. TERRY, RECEIVER,
vs.
LEOPOLD BAMBERGER.

To the hon. judges of the circuit court of U. S. for the 2d circuit and district of Connecticut:

The petition of the said Leopold Bamberger, defendant in the above-entitled action, respectfully represents:

That said defendant is aggrieved by the final judgment rendered against this defendant in this said action, and is informed that there is error therein to his prejudice, and he desires that a writ of error be allowed thereupon to the Supreme Court of the U. S.

Wherefore this defendant prays that a writ of error be allowed returnable to the next term of the Supreme Court of U. S.

LEOPOLD BAMBERGER,
By his attorney, H. B. MUNSON,
C. W. GILLETT.
M. J. WALDHEIMER.

2 Know all men by these presents, that we, Leopold Bamberger, of New York City, as principal, and Joseph Tomlinson, of Huntington, & Joseph Schwab, of Hartford, in the district of Connecticut, as sureties, are held and firmly bound unto George E. Terry, receiver, of Waterbury, in said district, in the full and just sum of fifteen thousand dollars to be paid to the said George E. Terry, receiver, his successor, or certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents, sealed with our seals, and dated this 28th day of July (1877), in the year one thousand eight hundred and seventy-seven.

Whereas lately at a circuit court of the U. S. within and for the district of Connecticut, in a suit depending in said court between George E. Terry, receiver, and Leopold Bamberger, defendant, judgment
3 was rendered against the said Leopold Bamberger; and the said Leopold Bamberger having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said George E. Terry citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said Leopold Bamberger shall prosecute his said writ of error to effect, and answer all damages and costs if in case he fails to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

LEOPOLD BAMBERGER. [L. S.]
JOSEPH TOMLINSON. [L. S.]
JOSEPH SCHWAB. [L. S.]

Sealed and delivered in presence of—
H. B. MUNSON.

Approved by—

N. SHIPMAN,
District Judge.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States for the district of Connecticut, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said circuit court before you between George E. Terry, receiver, and Leopold Bamberger a manifest error has happened to the great damage of said Leopold Bamberger, as by his complaint appears. We being willing that error, if any have been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send a record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October
5 next, in the said Supreme Court be then and there held, that a record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court, this 28th day of July, in the year of our Lord one thousand eight hundred and seventy seven.

[SEAL.] EDWIN E. MARVIN, *Clerk.*

6 United States of America to George E. Terry, receiver, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of U. S., within the district of Conn., wherein Leopold Bamberger is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in his behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of U. S., at Hartford, within said district of Connecticut, this 28th of July, 1877.

N. SHIPMAN,
Judge.

HARTFORD, CONN., *July 18th*, 1877.

Due legal service of the foregoing citation writ is hereby acknowledged.

KELLOGG & TERRY,
Attorneys.

7 The return of the judges of the circuit court of the United States for the district of Connecticut to the foregoing appeal.

The record, proceedings, and judgment whereof mention is therein made, follow in these words, viz:

GEO. E. TERRY, RECEIVER,
v.
LEOPOLD BAMBERGER.

Be it remembered that heretofore, to wit, on the 19th day of Septem-

ber, A. D. 1876, there was filed in the circuit court of the United States for the district of Connecticut, a transcript of a cause removed from the superior court of the State of Connecticut, within and for the county of New Haven, which transcript was in these words, viz:

8 To the sheriff of New Haven County or his deputy, or either of the constables of the town of Waterbury, and to the city sheriff of city of Waterbury within said county, greeting:

By authority of State of Connecticut you are hereby commanded to attach to the value of fifteen thousand dollars the goods or estate of Leopold Bamberger, of the city, county and State of New York, and for want thereof to attach his body, and him have to appear before the superior court to be holden at Waterbury, within and for the county of New Haven, on the first Tuesday of February, A. D. 1876, then and there to answer unto George E. Terry, of said Waterbury, as he is the receiver of the United States Button Co., a joint stock corporation duly organized and located and formerly doing business in said town of Waterbury, duly appointed by the superior court of said county,

9 on the 15th day of October, 1875, in a plea of the case, whereupon the plaintiff as such receiver declares and says:

That on the 1st day of November, A. D. 1875, he as such receiver was lawfully possessed of certain goods and chattels, to wit: 9,692 gross gilt buttons; 223½ gro. gilt buttons; 2½ sets gilt buttons; 65¾ gro. bombazine buttons; 289 gro. brocade buttons; 19 gro. gilt buttons; 1 gro. silvered buttons; 13 gt. gro. silvered suspender buttons; 4 gt. gro. silvered suspender buttons; ½ dozen letter scales; 240 dozen upholstery buttons; 60 dozen gilt snaps; 48 doz. shoe hooks; 15 gt. gro. glove buttons; 19 gt. gro. glove buttons; 125 gro. solid glove back; 18 gro. glove buttons, curved; 80 gro. silvered ornaments; 5 gro. steel ornaments; 15 gro. gilt ornaments; 3 gro. collar studs; 15½ gro. shirt buttons; 30 gro. plated shirt buttons; 100 gro. lasting buttons; 990 button rings; 14 gt. gro. button links; 410 gro. skirt slides; 100 skirt eyelets; 30 lbs. skirt hooks; 10 lbs. skirt washers;

2,190 gt. gro. hooks & eyes, of the value of fourteen thousand

10 dollars, as of his proper estate as receiver aforesaid, and being so possessed thereof he afterwards, to wit, on the 1st day of November, 1875, lost the aforesaid goods and chattels out of his hands and possession, which afterwards, on the 27th day of November, A. D. 1875, came into the hands and possession of the said defendant by finding; and though the said defendant well knew that said goods and chattels belonged to the said plaintiff as such receiver, as aforesaid, yet contriving and intending to deceive and defraud the plaintiff as such receiver as aforesaid, he, the said defendant, has at all times neglected and refused to deliver the aforesaid goods and chattels or any part of them to the plaintiff, though often requested and demanded so to do, and particularly on the 27th day of November, A. D. 1875.

And the plaintiff as such receiver further declares and says that the said defendant afterwards, on said 27th day of November, A. D.

11 1875, converted and disposed of the same to his own use, to the damage of the plaintiff as such receiver the sum of fifteen thousand dollars, and for the recovery thereof with just costs the plaintiff brings this suit.

G. S. Parsons is recognized in the sum of $140 to prosecute, &c.

Hereof fail not, but due service and return make according to law.

Dated at Waterbury, this 27th day of December, A. D. 1875.

CHAS. W. GILLETTE,
Justice of the Peace.

NEW HAVEN COUNTY, *ss:*

WATERBURY, *December 28th*, 1875.

Then I made diligent search throughout my precincts for goods or estate of the within named defendant whereof to attach, but could find none; and for want thereof I attached the body of the said defendant, read this writ in his hearing, and took sufficient bail for his appearance at court. And on the same day I left with the within named defendant a true and attested copy of this writ and process with my
12 said doings thereon endorsed.

Attest:

NOAH B. TUTTLE,
City Sheriff.

Fees: travel, 36 miles, 3.60; 1 service, .12; 1 copy, 1.50; 2 indorsements, .24, $5.46; 1 bail bond, .50, $5.96.

13 Waterbury superior court, February term, 1876.

GEORGE E. TERRY, RECEIVER,
vs.
LEOPOLD BAMBERGER.

Bill of exceptions.

Be it remembered that this term of this court was begun and holden at said Waterbury on the 1st Tuesday of February, A. D. 1876, and that from the time of the commencement of said term until the day of , A. D. 1876, there has not been any clerk of said court present until the day of said May, 1876, which said last named day of said May was the day to which said court had adjourned from time to time; and that on said day the defendant's counsel appeared in court and moved to erase said, the above entitled, cause from the docket of said court, for that this writ was no otherwise served than by one Tuttle, who undertook to serve the same in his official capacity of city sheriff of Waterbury, and that such service was wholly illegal and
14 void, and that this appears upon the face of the writ and process and record in said cause; which motion was overruled by said court, said court holding that the law was so that such motion was made too late to be entertained by said court.

And now the defendant here in court excepts to said ruling and decision, and prays that this bill of exceptions may be allowed and lodged on file.

By GILLETTE & MUNSON, *Att'ys.*

(Indorsed:) Filed 13th day of the February term, A. D. 1876.

15 Superior court, New Haven County, Feb'y term, A. D. 1876, at Waterbury.

GEORGE E. TERRY, RECEIVER,
vs.
LEOPOLD BAMBERGER. } Action of trover.

In the above entitled cause and the term thereof to which said cause was brought, the defendant in his own proper person files this his motion that said cause be erased from the docket of said court and dismissed, because he says—

I. That said writ and declaration were in no otherwise served upon the defendant than by one Noah B. Tuttle, a city sheriff of the city of Waterbury, leaving with the defendant a pretended copy of said writ and declaration, and making a pretended and illegal arrest of the body of the defendant wrongfully and illegally, and compelling him to furnish excessive bail, with surety for his appearance before the court to which purports to have been made returnable in order to regain his personal
16 liberty, and in truth and in fact so illegally restraining and imprisoning the defendant was compelled to, and did in fact, furnish such wrongful and illegal bail.

II. That at the said February term of said superior court (now in session, and not yet adjourned sine die), at Waterbury aforesaid, to which said court and said February term thereof said writ purports to have been made returnable, there has been no clerk in attendance with said court with whom the defendant could legally file his several motions, notices, and pleas in said cause, by means whereof the time limited within which the defendant may lawfully and conformably with the rules of practice of said court has not elapsed, and that he is entitled to be heard as of the first opening of said court.

III. And the defendant makes this, protesting that said court
17 has not jurisdiction of the party defendant or the cause of action aforesaid.

LEOPOLD BAMBERGER.

(Indorsed:) Filed May 25, 1876. Osborne, cl'k.

18 Superior court, Waterbury, February term, A. D. 1876.

GEORGE E. TERRY, RECEIVER,
vs.
LEOPOLD BAMBERGER. } Action of trover.

The defendant, at the February term of said court, to which said cause was made returnable, requests that the said cause be entered on the jury docket of said court pursuant to the statute in such case provided, and as of right he may demand.

LEOPOLD BAMBERGER.

(Indorsed:) Filed May 25, 1876. Osborne, cl'k.

19 Sup. c't N. H. County, Feb. T., 1876, at Waterbury.

GEO. E. TERRY, REC.
vs.
LEOPOLD BAMBERGER.

On motion to erase for defective service, in that it is claimed that the court acquired no jurisdiction over the defendant because the officer who served the process in said action had no authority to do so, the court finds that this cause was entered upon the docket of this court at its present term, and at the first day thereof the defendant entered a general appearance by an attorney of this court; that at the first day of said term motion was made by plaintiff for special bail, and also that said cause might be assigned for trial, which was resisted by the attorney for the defendant; that afterwards on several occasions plaintiff moved to have said cause assigned for trial, on each of which days the defendant, by his attorney, resisted said motion, and asked for

20 delay, and that the same be not assigned for any certain time; that the motion to erase was for the first time made on the 11th day of this term, to wit, on the 4th day of May, A. D. 1876; that no plea in abatement or to the jurisdiction has been filed in this case; that the defendant by entering an appearance by an attorney of this court, and filing no plea in abatement or to the jurisdiction, has waived the want of jurisdiction, and submitted to the same, and the motion comes too late. The motion to erase, therefore, is denied.

HITCHCOCK, *Judge.*

(Indorsed:) Filed 8th June term, 1876.

21 Superior court New Haven County, Feb'y term, A. D. 1876, Waterbury.

GEORGE E. TERRY, RECEIVER,
vs.
LEOPOLD BAMBERGER.

The defendant having made his motion to the court that the case be dismissed for want of legal service of the plaintiff's writ and process upon the defendant, and the defendant's said motion having been dismissed on the ground that said motion was not made upon the opening of said term of said court, and having been ordered to plead or stand upon the general issue against his protest, and to save his rights and against his will, at this juncture of the proceedings denies the truth of the matters in the plaintiff's declaration alleged, and thereof puts himself on the jury for trial.

By MUNSON & GILLETTE,
Att'y

The plaintiff will take notice that in the trial of the above-entitled case the defendant will claim and offer evidence to prove, should
22 the same become necessary, that before the date of the plaintiff's writ, and for a long time before said cause of action arose, if any such ever did arise, the United States Button Company, a joint stock corporation, of Waterbury aforesaid, mentioned in said writ, sold and delivered to Samuel A. Castle, Henry S. Magrom, and Rufus E. Hitchcock, partners in company doing business in the city, county, and State of New York, under the firm name of "S. A. Castle & Co.," the goods, chattels, and articles of personal property in the plaintiff's declaration; that in payment and in full consideration for said goods, chattels, and articles of personal property in the plaintiff's said declaration mentioned, said S. A. Castle & Co. made and delivered to said United States Button Co. their promissory notes and bills of exchange, which said notes and bills of exchange were accepted and renewed by said United
23 States Button Co. in full payment and satisfaction for said goods, chattels, and articles of personal property.

That after the sale and delivery of said goods, &c., as aforesaid, and of the execution and delivery of said notes and bills in payment and satisfaction therefor as aforesaid, said S. A. Castle & Co., and the several members of said firm, made their certain assignment in writing of all their assets and effects for the benefit of their several creditors in proportion to their respective claims, to the defendant in said city, county, and State of New York, and under and by virtue of the statute laws of said last-mentioned State.

That said defendant accepted said trust, received all the assets and

effects of said assigning debtor, including therewith the goods, chattels, and articles of personal property in the plaintiff's declaration, of which he returned to the court having jurisdiction of the matter his inventory of the same as the proper estate of said S. A. Castle & Co.

24 That in all said proceedings the defendant has proceeded according to law, as will fully appear by authenticated copies of said assignment, the lawful bond of the defendant as assignee aforesaid, the inventory and all other proceedings therein, ready in court to be shown, appears.

That the title to said goods, chattels, and articles of personal property in the plaintiff's declaration mentioned, vested in the defendant by virtue of said assignment, and the legal proceedings thereunder; that the matter never was within the jurisdiction of this court; that the plaintiff never had any right, title, or interest, legal or equitable, therein or thereto.

(Indorsed:) Filed 10th day of June term, 1876.

25 Superior court, Waterbury, June term, A. D. 1876.

NEW HAVEN COUNTY, *ss:*

GEORGE E. TERRY, RECEIVER,
vs.
LEOPOLD BAMBERGER.

To the honorable superior court now in session at Waterbury, within and for the county of New Haven:

The petition of Leopold Bamberger respectfully shows that your petitioner is the defendant in this suit, and that the same was brought by George E. Terry, as receiver, on or about the twenty-seventh day of December, 1875, in the said superior court, and that the said plaintiff is and was at the time of the bringing the same a citizen and resident of the State of Connecticut, and that your petitioner is and was at said time a citizen and resident of the State of New York.

That the amount in dispute in said suit between the said Terry and your petitioner, exclusive of costs, exceeds the sum of five hundred dollars.

26 And your petitioner further shows that the said suit has not yet been tried, that the same is still pending for trial in the said superior court, and that your petitioner desires to remove the said suit before the trial thereof into the next circuit court of the United States, to be held in the city of Hartford, district of Connecticut, on the 3rd Tuesday of September, A. D. 1876, in pursuance of the provisions of section 639 of title xiii, chapter 7, of the Revised Statutes of the United States, and that your petitioner is ready and willing to give good and sufficient surety, as this court may direct, for his doing all acts and things required to be done by the said provisions of law upon removal of a suit into the United States court, and he offers herewith his bond, executed by Joel E. Hyams, of the city, county, and State of New York, in the penal sum of five hundred dollars, conditioned that your petitioner

27 shall enter in the next circuit court of the United States to be held in the said district of Connecticut as aforesaid, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in this suit, and doing such other appro-

priate acts as by the Revised Statutes are required to be done upon the removal of a suit into the United States court.

And your petitioner therefore prays that the said bond may be accepted as good and sufficient surety according to said provisions of law, and that the said suit may be removed into the next circuit court of the United States to be held in the said district of Connecticut as aforesaid, pursuant to the statutes of the United States in such case made and provided, and that no further proceedings may be had therein in this court.

And your petitioner says that he has made and filed the affidavit required by the said provisions of the said Revised Statutes, a copy
28 of which is hereto annexed, marked A, which he prays may be taken as a part of this petition.

And your petitioner will ever pray, &c.

LEOPOLD BAMBERGER,
By MUNSON & GILLETTE,
Attorneys.

STATE OF NEW YORK,
City and County of New York:

Leopold Bamberger, the petitioner in the foregoing petitioner, being duly sworn, deposes and says that he has read the petition subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true; and further saith not.

LEOPOLD BAMBERGER.

Subscribed and sworn to this twentieth day of June, 1876, before me.
[SEAL.] ALEX. OSTRANDER,
Commissioner for Connecticut in New York.

29 A.

Superior court, Waterbury, June term, A. D. 1876.

NEW HAVEN COUNTY, *ss:*

GEORGE E. TERRY, RECEIVER,
ag'st
LEOPOLD BAMBERGER.

STATE OF NEW YORK,
City and County of New York, ss:

Leopold Bamberger, being duly sworn, deposes and says that he is a citizen of the State of New York, and resides in the city of New York, in said State, and is the defendant in the above-entitled action; that the plaintiff is a citizen and resident of the State of Connecticut; that the suit was brought on or about the 27th day of December, 1875, in the said superior court.

This deponent further says that he has reason to believe, and does believe, that from prejudice and local influence he will not be able to obtain justice in said court, and therefore makes this affidavit
30 for the purpose of removing said suit into the circuit court of the United States for the district of Connecticut, to be held at Hartford, in pursuance of the provisions of section 639, title xiii, chapter 7,

of the Revised Statutes of the United States in such case made and provided; and that he has made and filed his petition in pursuance of the provisions of said law for the removal of this cause from the said superior court into the said circuit court of the United States.

LEOPOLD BAMBERGER.

Subscribed and sworn to before me this 20th day of June, 1876.

[SEAL.] ALEX. OSTRANDER,
Commissioner for Connecticut in New York.

Superior court, Waterbury, June term, A. D. 1876.

NEW HAVEN COUNTY, *ss:*

GEORGE E. TERRY, RECEIVER,
ag'st
LEOPOLD BAMBERGER.

Know all men by these presents, we, Leopold Bamberger, of
31 the city, county, and State of New York, as principal, and Joel E. Hyams, of the same place, as surety, are held and firmly bound unto George E. Terry, receiver, of the State of Connecticut (plaintiff in above-entitled action), in the sum of five hundred dollars lawful money of the United States of America, to be paid to the said George E. Terry, receiver, his successors or assigns, for which payment well and truly to be made we hereby bind ourselves, our heirs, executors, and administrators firmly by these presents, sealed with our seals and dated this twentieth day of June, 1876.

Whereas a suit was brought on or about the twenty-seventh day of December, 1875, in the superior court of Connecticut, holden at Waterbury, within and for the county of New Haven, by the said George E. Terry, receiver, against the said Leopold Bamberger, and the same is now pending for trial in said court and is removable into the
32 circuit court of the United States for the Connecticut district of , under and in pursuance of section 639, title xiii, chapter 7, of the Revised Statutes of the United States; and

Whereas the said Leopold Bamberger has filed his petition in said superior court for the removal of said suit into the next circuit court of the United States, to be held in the aforementioned district of Connecticut, at Hartford, on the third Tuesday of September, 1876, and has also made and filed in the said superior court the affidavit required by the provisions of the said Revised Statutes for the removal of suits into the United States circuit court:

Now, therefore, the condition of the above obligation is such that if the above bounden Leopold Bamberger, or his legal representatives, shall enter or cause to be entered in the circuit court of the United States for the aforementioned district of Connecticut, on the first day of its stated session next ensuing after the order of the said superior
33 court for the removal of the said suit into said circuit court, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and do or cause to be done such other appropriate acts as by the provisions of the said Revised Statutes are required to be done upon the removal of a suit into the United States court, then the above obligation to be void, otherwise to remain in full force and virtue.

LEOPOLD BAMBERGER. [SEAL.]
JOEL E. HYAMS. [SEAL.]

STATE OF NEW YORK,
City & County of New York, ss:

Leopold Bamberger, the principal in the foregoing obligation named, being duly sworn, deposes and says that he is a resident and freeholder of the State of New York, and is worth the sum of one thousand dollars over all his just debts and liabilities, and exclusive of property
34 exempt by law from execution.

LEOPOLD BAMBERGER.

Subscribed and sworn to before me this 20th day of June, 1876.
[SEAL.] ALEX. OSTRANDER,
Commissioner for Connecticut in New York.

STATE OF NEW YORK,
City and County of New York, ss:

Joel E. Hyams, the surety in the foregoing obligation named, being duly sworn, deposes and says that he is a resident and freeholder of the State of New York, and is worth the sum of one thousand dollars over all his just debts and liabilities, and exclusive of property exempt by law from execution.

JOEL E. HYAMS.

Subscribed and sworn to before me this 20th day of June, 1876.
ALEX. OSTRANDER,
Commissioner for Connecticut in New York.

35 I certify that on this 20th day of June, 1876, before me personally appeared Leopold Bamberger and Joel E. Hyams, to me known to be the persons described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same as their own free act and deed for the uses and purposes therein mentioned.
[SEAL.] ALEX. OSTRANDER,
Commissioner for Connecticut in New York.

36 STATE OF CONNECTICUT,
County of New Haven, ss:

Superior court, June term, the 15th day of September, A. D. 1876.

GEORGE E. TERRY, RECEIVER,
vs.
LEOPOLD BAMBERGER.

Be it remembered that then and there personally appeared before said court Leopold Bamberger, of the city, county, and State of New York, as principal, and Joseph Tomlinson, of Huntington, in Fairfield County, as surety, and acknowledged themselves to be jointly and severally bound in a recognizance to the plaintiff in the sum of fifteen thousand dollars, conditioned that the said Leopold Bamberger shall appear before the superior court held at Waterbury, within and for the county of New Haven, then and there to answer to said action and abide the judgment that may be recovered in the above entitled cause.

JONATHAN INGERSOLL,
Ass't Clerk.

37 Sup. ct. New Haven. After filing motion & papers for removal to the circuit court of the United States.

GEORGE E. TERRY, RECEIVER,
vs.
LEOPOLD BAMBERGER.

In the matter of the furnishing special bail by the defendant, as directed by the judge of said court at the June term thereof, 1876.

The defendant, saving and reserving to himself all rights, interests and advantages which to him in anywise appertaining in his relation to said cause, or anywise connected therewith, and waiving nothing hereby pursuant to said order aforesaid, offering special bail, makes said offer and files said special bail, claiming and protesting that said plaintiff is not entitled to demand or procure special bail in said cause, because he says that among the sundry and manifest reasons for the defendant's protest the writ and process in said cause was never any other-
38 wise served upon the defendant than by one Noah B. Tuttle, pretending to serve the same as city sheriff, of the city of Waterbury, and the pretended arrest was no otherwise made than by said Noah B. Tuttle, pretending to act therein in his said capacity as city sheriff as aforesaid; that said city sheriff had no authority or power by law to make said pretended attachment and arrest, and that the same was wholly unlawful and void; that the bail offered to and accepted by said city sheriff was given by the defendant by mistake and ignorance of the laws of the State of Connecticut, in which said State said pretended arrest and attachment was made; that said arrest and attachment was illegal, and the holding of the defendant under such arrest was a false imprisonment; that said service having been void, and the detention of the defendant thereunder a false imprisonment, and
39 all subsequent proceedings relating to said arrest, attachment, and imprisonment, and special bail being founded upon said false, fraudulent, and illegal proceedings involving the rights and personal liberty of the defendant are likewise void and illegal.

Wherefore, while obeying the order of said court that he may not be held in contempt of the same, he protests against the same as not within the power of said court or of the judges of the same to demand or require said special bail in said action as ordered, saving as aforesaid all rights to himself, to be heard on motion or otherwise in any manner in relation to the subject-matter of said , and all matters and things growing out of the same in this or any other court as he may see fit.

LEOPOLD BAMBERGER.

(Indorsed:) Filed Sept. 15th, 1876. Ingersoll, ass't cl'k.

40 STATE OF CONNECTICUT,
New Haven County, ss:

At a superior court held at Waterbury, in and for New Haven County on the first Tuesday of June, A. D. 1876.

Present, Hon. Earl Martin, judge; Edward F. Cole, assistant clerk; John C. Byxbee, esq., sheriff.

GEORGE E. TERRY, OF THE TOWN OF WATERBURY, in New Haven County, receiver of the United States Button Company, a joint stock corporation duly organized and located and formerly doing business in said town of Waterbury, plaintiff,
vs.
LEOPOLD BAMBERGER, OF THE CITY, COUNTY, and State of New York, defendant.

This action came to the February term of this court, A. D. 1876, by writ on file, dated the 27th day of December, A. D. 1875, and demanding $15,000 damages.

41 The parties appeared and were heard upon a motion to erase said case from the docket, which motion was overruled by the court.

And the case came thence by continuance to the present term of this court, when the parties appeared, and the defendant at a said term filed a petition for the removal of said cause to the circuit court of the United States within and for the second circuit, to be held on the 3rd Tuesday of September, A. D. 1876, together with an affidavit and a bond with security, all according to the statute in such cases provided, of all which the plaintiff had due notice.

And this court accepts said bond and security, and thereupon orders that said cause be removed to the circuit court of the United States to be held in and for the 2nd circuit on the 3rd Tuesday of September, A. D. 1876.

42 I, Edward A. Anketell, assistant clerk of the superior court within and for New Haven County, hereby certify that the above and foregoing is a true copy of all the process and pleadings and other proceedings in said cause of George E. Terry, receiver, vs. Leopold Bamberger.

In testimony whereof I have hereunto set my hand and the seal of said court this 18th day of September, A. D. 1876.

[SEAL OF SUP. C'T.] EDWARD A. ANKETELL,
Assistant Clerk.

And on the 19th day of September, A. D. 1876, the plaintiff filed his motion to remand, as follows, viz:

43 Circuit court of the United States for the district of Connecticut, September T., 1876.

GEO. E. TERRY, RECEIVER,
vs.
LEOPOLD BAMBERGER.

The plaintiff in his own proper person appears in court, and moves your hon. that said cause be remanded to the superior court for New Haven County in said State, from which said court said case was removed to this court, for that he says—

1st. That no bond was filed to the acceptance of said superior court as provided by law, but that the bond as set forth in the record was refused by said court, and ought not to be a part of the record in said case.

2nd. That said application for removal professes to be made under

44 and by virtue of section 639, of title XIII, chapter 7, of the Revised Statutes of the United States, which said section was repealed by the act of Congress, March 3rd, 1875; which said act now governs in all cases sought to be removed.

3rd. That said cause was brought to said superior court for New Haven County at its February term, 1876, at which said time, to wit, on the 26th day of May, 1876, said cause was by said court specially assigned for trial, and might have been at said time tried, but the defendant, to avoid trial thereof, placed said cause on the jury docket of said court, and was then continued to the June term of said court, at which said time said motion was made for removal.

Wherefore he moves said cause be remanded to said superior court.

GEO. E. TERRY.

45 And the parties having been heard on said motion, & the said motion having been denied by court, the parties filed their stipulation to try the issue to court & to expunge a certain portion of the record, viz:

Stipulation.

In the circuit court of the United States, district, of Connecticut.

GEO. E. TERRY, REC'R,
vs.
LEOPOLD BAMBERGER.

The parties to the above entitled cause do hereby stipulate that the same may be tried to the court, and at such time as the judge thereof shall fix and appoint, between the date hereof and the 1st day of February, A. D. 1877. And it is further stipulated that that part of the record which purports to be a bill of exceptions shall be expunged therefrom, the same appearing therein by mistake.

Waterbury, Oct. 16th, 1876.

GEO. E. TERRY, *Rec'r.*
LEOPOLD BAMBERGER,
By MUNSON & GILLETTE.

46 And on the 15th day of May, 1877, the plaintiffs filed in court the following additional counts to their declaration, viz:

Additional counts.

GEORGE E. TERRY, RECEIVER,
vs.
LEOPOLD BAMBERGER.

And in a further plea of the case, whereupon the plaintiff declares and says that he is the receiver of the said United States Button Company described in the first count of said declaration, duly appointed by the superior court for said New Haven County at the October term of said court, 1875 (to wit, on the 15th day of October, 1875), and that he, the said Terry, gave bonds as such receiver, according to law, and was duly qualified in all respects according to law as such receiver; and that on the 1st day of August, 1875, the said United States Button Co. was lawfully possessed of certain goods and chattels as of their own
47 proper estate, and of the value of fifteen thousand dollars, to wit:

4,014 gross gilt and silvered buttons.
6,647 " gilt and silvered buttons.
410 " assorted buttons.
1,003 M plain rings.
65 gross bombazine buttons.
285 " assorted buttons.
15 " glove buttons.
143 " sol'd glove buttons.
22 " assorted buttons.
$\frac{11}{12}$ doz. letter scales (lot).
2,189 gross assorted hooks and eyes.
13 " assorted hooks and eyes.

All of which were and are of the value of fifteen thousand dollars.

And being so thereof possessed, the said United States Button Co. afterwards, and before the appointment of said Terry as receiver aforesaid, to wit, on the 12th day of August, 1875, casually lost said goods out of its possession, and the same afterwards, and before the ap-
48 pointment of said Terry as receiver aforesaid, to wit, on the said 12th day of August, 1875, came into the hands and possession of the defendant by finding.

Yet the defendant, well knowing the said goods and chattels to be the property of the said United States Button Co., and of right to belong and appertain to the said United States Button Co., and to the plaintiff, as receiver aforesaid, after his appointment as aforesaid, but contriving and intending to deceive and defraud the said United States Button Co., and the plaintiff, as receiver aforesaid, since his appointment as aforesaid, did not deliver said goods and chattels, or any part of them, to the United States Button Co., nor has he ever since delivered the same, or any part thereof, to the said United States Button Co., nor has he ever delivered the same, or any part thereof, to the plaintiff, as receiver aforesaid, since his appointment, though often requested so to do;
49 and the defendant afterwards, to wit, on the 1st day of September, 1875, and before the appointment of the plaintiff as receiver aforesaid, converted and disposed of said goods and chattels to his own use.

And in a further plea of the case, whereupon the plaintiff, as receiver aforesaid, further declares and says that he is the receiver of the United States Button Co., a corporation as described in the first count of this declaration, duly appointed as such receiver by the superior court for New Haven County, at the October term thereof, 1875, and duly qualified in all respects according to law, as described in the other counts of this declaration; and that he duly accepted said trust as receiver aforesaid; and that on the 1st day of August, 1875, and before the appointment of the plaintiff as receiver aforesaid, the said United States
50 Button Co. was lawfully possessed of certain goods and chattels as of their own proper estate, and of the value of fifteen thousand dollars, to wit, the goods and chattels described and specified in the first count of the said declaration in this case.

And being so thereof possessed, the said United States Button Co. afterwards, and before the appointment of the plaintiff as receiver aforesaid, to wit, on the 12th day of August, 1875, casually lost said goods and chattels out of its hands and possession, and the same afterwards, and before the appointment of the plaintiff as receiver aforesaid, to wit, on said 12th day of August, 1875, at the city of New York, in the county and State of New York, came into the hands and possession of the de-

fendant by finding. Yet the defendant, well knowing the said goods and chattels to be the property of the said United States Button Co., and of right to belong and appertain to the said United States
51 Button Co., and to the plaintiff as receiver aforesaid, after his appointment as aforesaid, but contriving and intending to deceive and defraud the said United States Button Co., and the plaintiff, as receiver aforesaid, since his appointment as aforesaid, did not deliver said goods and chattels, or any part thereof, to the said United States Button Co., though thereto requested and demanded, nor has he ever delivered the same, or any part thereof, to the said United States Button Co., nor to the plaintiff, as receiver aforesaid, since his appointment as such receiver, though often requested and demanded so to do: and the defendant afterwards, to wit, on the 1st day of September, 1875, and before the plaintiff's appointment as receiver aforesaid, converted and disposed of said goods and chattels to his own use, to the damage of the plaintiff, as receiver aforesaid, the sum of fifteen thousand dollars.

52 And on the same day the defendants filed their plea to said counts as follows, viz:

Defendant's plea.

U. S. circuit court. May 15, 1877.

GEO. E. TERRY, RECEIVER,
vs.
LEOPOLD BAMBERGER.

As to the two additional counts, added by way of amendment, and allowed by this court on the 15th day of May, A. D. 1877, the defendant denies the truth of the matters therein alleged, and thereof puts himself on the jury for trial.

L. BAMBERGER,
By WALDHEIMER, MUNSON & GILLETTE,
Att'ys.

And said cause was thereupon fully heard, the parties appearing with counsel and witnesses, and on the 24th day of May, 1877, the court filed its finding and opinion as follows, viz:

53–56 Circuit court of the United States for the district of Connecticut.

GEORGE E. TERRY, RECEIVER,
vs.
LEOPOLD BAMBERGER.

SHIPMAN, J.:

This case was tried by the court, the parties having by written stipulation, duly signed, waived a jury. Upon said trial by the court, both parties appeared by their counsel and with their witnesses, and were fully heard respecting the controverted questions of law and of fact. The facts which are found to have been proved are as follows:

On or about August 12th, 1875, the firm of S. A. Castle & Co., of the city of New York, consisting of Samuel A. Castle, Rufus E.
57 Hitchcock, and Henry S. McGrane, being insolvent, made an as-

signment in insolvency of all their goods and effects, for the joint and equal benefit of their creditors, under the statute of New York of April 13th, 1860, to Leopold Bamberger, of said city, who accepted said trust, gave bonds according to law, and entered upon his duties on August 12th, 1875.

Previous to this time said firm had been the selling agents in said city of the United States Button Company, a joint-stock corporation, duly incorporated in pursuance of the laws of this State, and established in Waterbury. Said firm had in their store on said August 12th, 1875, the manufactured goods of said company which had been theretofore sent to them for sale upon commission to a large amount, which
58 goods were the property of said button company. The market value of said goods was $7,500. The company had not been in the habit of drawing against their consignments, but prior to this date had obtained from S. A. Castle & Co. their accommodation acceptances to the amount of $22,500, and it was agreed between said parties at the time when said acceptances were given that said firm should have a lien on the goods which were from time to time unsold as security against their liability upon said acceptances. These acceptances had been discounted for the benefit of said button company, and were then held and owned by the Waterbury National Bank.

The goods of said company in the possession of S. A. Castle & Co. were specified in their inventory, which was duly made and filed, in pursuance of the laws of the State of New York, under the head
59 of "Goods on hand on which allowances have been made, and merchandise in stock," &c., as "consigned by the United States Button Co.," and were appraised at $6,054. The assignee thus had notice of the ownership of the goods. Said Bamberger immediately took possession of said goods as his own, and as equitably belonging to the creditors of S. A. Castle & Co., and proceeded forthwith to sell them as rapidly as he was able for the benefit of said estate. On September 24th, 1875, said button company took up and received said acceptances from the Waterbury National Bank by the substitution of the button company's notes therefor, and thereupon the president of said company carried said acceptances to New York, tendered them to said Bamberger, and demanded of him the goods belonging to said company, but
60 said Bamberger refused to deliver the same, and continued the sale thereof.

On or about November 1st, 1875, the plaintiff was duly appointed received of the estate of said Waterbury Button Company, by the superior court of New Haven County, under and by virtue of the 23d section, chapter 1 of title XVII of the general statutes of Connecticut (revision of 1875, page 281), and said receiver was authorized by the decree of said court to execute the powers specified in the 1st section of part XIV, chapter 17, title XIX, of said general statutes (revision of 1875, page 482); copies of said decree and of the petition upon which the same was based are hereunto annexed, marked A and B. The plaintiff accepted said trust, gave bonds pursuant to law, which were accepted by said court, and entered upon his duties.

61 On November 24th, 1875, the plaintiff, accompanied by the secretary of said company as a witness, again tendered to said Bamberger, in the city of New York, said acceptances, and again demanded said goods as the property of said Button Company. But said Bamberger refused to deliver them. The plaintiff then asked Bamberger if there were any other acceptances outstanding against said goods, or if there were any other claims or charges against the goods for interest,

commissions, &c., except the tendered drafts, to which inquiry Bamberger replied in the negative. Upon the payment of said accommodition acceptances, S. A. Castle & Co. were indebted to said Button Company in a large amount, as appeared by said inventory. The present action was brought in a State court of this State, and was removed to this court by the defendant.

62 At the close of the testimony, the plaintiff asked and obtained leave, against the objection of the defendants to amend the declaration by the addition of the 2d & 3d counts for a conversion prior to the plaintiffs appointment. Opportunity was given to the defendant, after the allowance of said amendments, to introduce additional testimony if he desired.

Upon the foregoing facts, the conclusions of law are as follows:

1. The defendant rightfully took possession of the goods of the Button Company, but tortiously converted them thereafter.

S. A. Castle & Co. were the factors of the Button Company, and as such were personally intrusted with the sale of its goods. This trust was a personal one, and could not be delegated to another beyond

63 the usual course of business, without the consent of the consignors. Neither had Castle & Co. any right to sell or transfer the goods in payment or in pledge for their own indebtedness. Having a lien upon the goods as security for their liability upon the accommodation acceptances which they had given to the consignors, Castle & Co. had a right to transfer said lien to their creditors and deliver the goods to their assignee for the benefit of their creditors, solely as a security to the extent of said lien. The Button Company could not regain possession until they had tendered to the assignee the amount of the lien of Castle and Co., or otherwise discharged said lien, and upon such tender or discharge had the right to regain possession of their property, if it could be traced, or distinguished from the mass of the other property of the factor in the possession of the assignee. (Warner v. Martin, 11

64–68 Howard, 209; Veil v. Mitchell, 4 Wash. C. C., 105; Thompson v. Perkins, 3 Mason, 232; Cook v. Kelley, 9 Bosw., 358; M'f'g Co. vs. Wilson, 5 Pick., 7; Wenston v. Perkins, 2 Pick., 86; Scott v. Surman, Willes R., 400.)

But the rightful possession of the assignee gave him no authority to assume to himself the entire property or right of disposing of the goods until duly authorized by law; and when having taken possession, with notice that the goods were the property of the Button Company, he proceeded to sell and convert them into money, as rapidly as he could, there was a conversion. The action of trover "always supposes the defendant to have come legally into possession of the goods. It is the breach of the trust or the abuse of such lawful possession which constitutes the conversion." (Murray v. Bruling, 10 Johns., 172; Cormab v. Hale, 23 Wend., 462; Fiské v. Ewens, 46 N. H., 173; Baldwin v. Cole, 6 Mod., 212; McCombie v. Davies, 6 East., 540.)

69 The plaintiff, as receiver, had a right to institute a suit in this State against the defendant for a conversion happening prior to the plaintiff's appointment.

It is contended that the decree of the State court had no extra territorial jurisdiction, and gave the plaintiff no title to property beyond the limits of this State; and that therefore he had no right to institute a suit for the recovery of the value of property which had been since his appointment beyond the jurisdiction of this State. But the statutes of

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Friday

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Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 150.

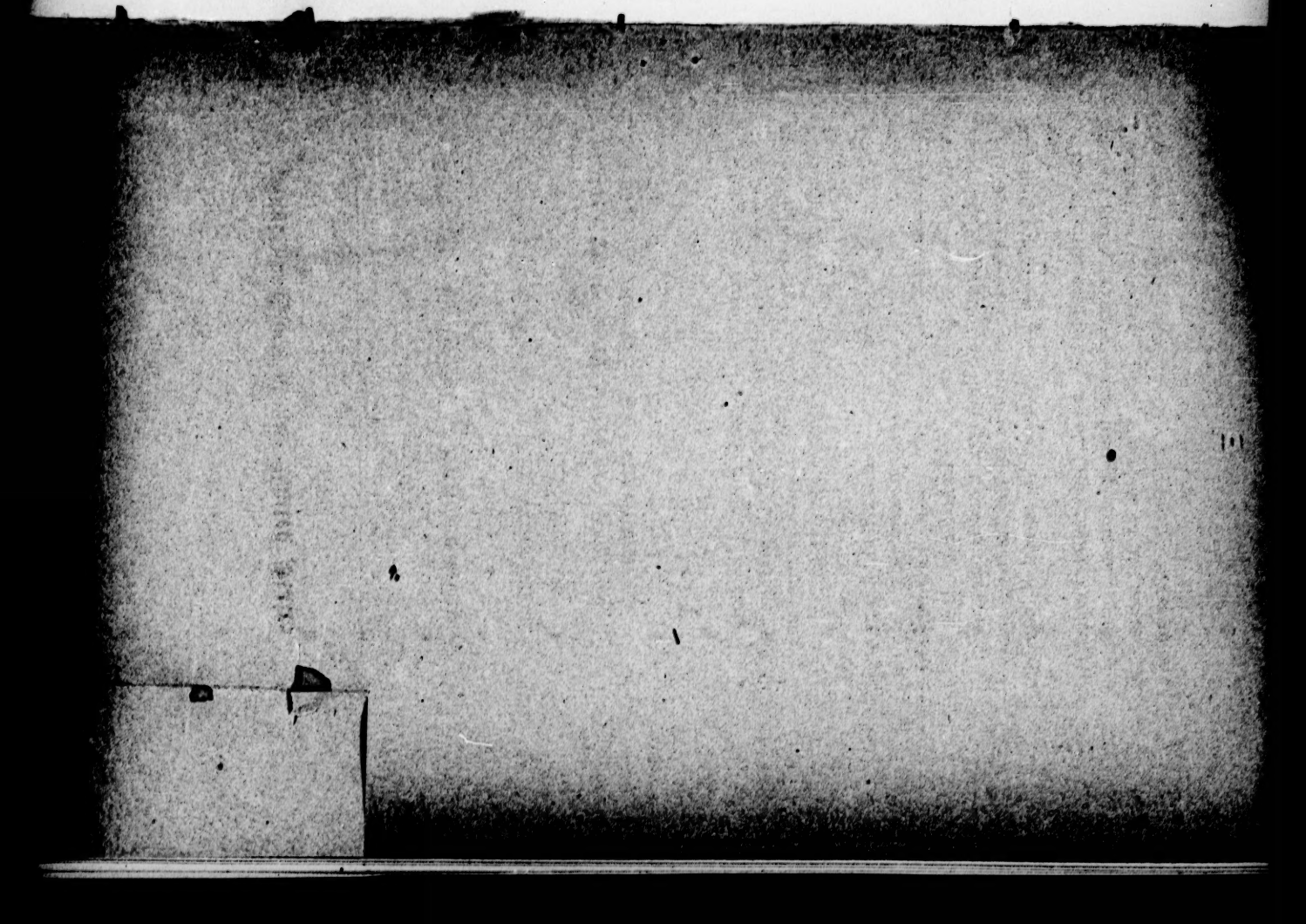
LEOPOLD BAMBERGER, Plaintiff-in-Error,

vs.

GEORGE E. TERRY, Defendant-in-Error.

BRIEF FOR PLAINTIFF.

W. H. Moore, Printer, 511 Eleventh Street.



Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 150.

LEOPOLD BAMBERGER, PLAINTIFF-IN-ERROR,

vs.

GEORGE E. TERRY, DEFENDANT-IN-ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

Abstract.

Originally, action was brought, in 1876, by the Defendant in Error, in the Superior Court for New Haven County in the District of Connecticut. The cause was removed, after issue joined, on motion of the then Defendant, here Plaintiff, to the Circuit Court of the United States for the District of Connecticut. There trial was had by the Court, on an alleged submission to the Court and waiver of trial by jury. On the finding of the Court, judgment was given for the Plaintiff there, here Defendant. It is to reverse that judgment that the present suit is prosecuted.

(It is not essential to include in the farther statement anything about the jurisdiction of the person of Bamberger.)

The original action was one of Trover, and the declaration alleged a conversion *after* the appointment of the then Plaintiff as Receiver. After the close of the testimony, the then Plaintiff asked, and against the objection of the

then Defendant, obtained leave to amend his declaration, and did amend it, alleging a conversion *prior* to his appointment as Receiver. After said amendment there was no waiver, and there was express demand, of trial by Jury.

Taking the original declaration and the amendment together, the case of Terry, as Receiver, was displayed to this effect: He was appointed on or about the 7th of November, 1875, by the Superior Court of New Haven County in the State of Connecticut. The appointment vested him with power to possess the goods and collect the credits of the United States Button Co., a joint stock corporation organized under the written laws of Connecticut. (§ 23, ch. I, title XVII., Gen. Stat., (Revision of 1875, p. 281,) and had authority to exercise the powers specified in § 1, part XIV, ch. VIII, title XIX, of said statutes, (Rev. of 1875, p. 482.) Before his appointment, A. S. Castle & Co., of New York City, were the selling agents of the corporation, and had in their store, in New York City, the goods referred to in the pleadings. Castle & Co. had given to the Button Co. their accommodation acceptances to a large amount. These had been accepted by the corporation and were, on the 12th of August, 1878, outstanding, subject to an agreement between the parties, that Castle & Co. should at all times have a lien on any goods of the corporation, so held by them unsold, to secure them as to said acceptances. On the day last named, Castle & Co., made an insolvency assignment, under the laws of New York, to Leopold Bamberger, now the Plaintiff, who was the Defendant in the action of Trover. At the time of the assignment, Castle & Co. specified in an inventory the goods of the Button Co.; and this is claimed to have been notice to him. But, it is alleged, he took possession of the goods and immediately began to sell the same, for the benefit of the creditors of his assignors.

Sept. 27, 1875, the Button Co. being then the owner of all the accommodation acceptances of said Castle & Co., tendered the same to Bamberger, as the assignee of Castle

& Co., and demanded the goods belonging to the corporation; but he refused to surrender the goods and continued to dispose of them.

Assignment of Errors.

I. One of the assignments of Error is that the Court below erred in not giving a right of trial by Jury as demanded, and in continuing to try the case. (See p. 16 of the Record.)

II. The Plaintiff also assigns for Error that, on the Defendant in Error's own showing, in his pleadings, he had no right to goods which were not in the State of Connecticut.

III. The Plaintiff in Error also assigns for Error that the Court below erred in allowing the amendment shown in the record. (See pp. 15, 16 of the Record.)

Brief of Argument.

I. As to the denial of a Jury Trial, (see p. 16 of Record,) I propose to say a word or two.

The amendments were or they were not material. The Court below considered them material. They were considered by the counsel of the Receiver as material. In view of this, what was the effect of the stipulation entered into by Bamberger, *before the making of the amendments*, (see p. 16 of the Record)? Did it bind him to submit the case on a materially amended declaration?

We are told by learned counsel on the other side, that having once waived a Jury Trial, Bamberger "would not be permitted to trifle with the Court, by withdrawing his waiver upon some caprice or whim." The question here is not of trifling. It is not of some caprice or of some whim. The question is of an exceedingly important jural interest.

The Court had no more right to trifle with that interest than had any litigant.

It will not do to answer that the allowance of amendments, being discretionary with the Court, cannot be reviewed on Error. No trained Lawyer, I suppose, will question that the direction to allow amendments can be carried so far as to cut off the right to trial by jury.

As the case stood before the overruling of Bamberger's objection to the allowance of amendments, he might well be satisfied, and even more than willing, to have the case tried by the Court; but, his objection being overruled, and the declaration being amended in a material point, might he not well demand the very kind of trial he had waived, as the case had stood on the pleadings? As to *damages*, at least, he might prefer to have a Jury Trial, after such amendment. And if he had such a *right*, he was not called on to give reasons for its exercise.

The learned counsel on the other side remark that the evidence of conversion was introduced without objection. What of that? No right of any sort was waived by failing to object to the introduction of that evidence.

The case of *West* v. *Smith* (a) is not cited on the other side, but doubtless it will be remembered and considered by the Court. It fully recognizes the fit rules, as to amendments, where an action has been removed from a State Court to the Circuit Court of the United States. It holds that in such case, the plaintiff may have leave to amend his declaration by inserting new counts for the same cause of action as that alleged in the original counts. But it does not determine anything as to the effect of such have on a waver of Jury Trial.

Mr. Justice Clifford cites *Nash* v. *Adams*, (b) and observes that the practice of allowing amendments is carried, in Connecticut, to such an extent as to justify the remark of the Court in that case that the decisions of other States furnish but little guidance in expound-

(a) 101 U. S., (11 Otto), 265. (b) 24 Conn., 33-38.

ing the meaning of their statute upon the subject. I am not here questioning the large discretions of the power to allow amendments. In a soon to be published book, entitled *Active Law*, I have said hearty words in favor of the theory advanced in *West* v. *Smith*. But still I ask this Court, in view of the great value of the jural interest involved in Jury Trial, to consider carefully the question that is here presented as to the effect of allowing a material amendment, on a foregoing waiver of that form of trial, if the person against whose objection the amendment is allowed, refuses to continue his agreement to Trial by the Court.

II. For reasons partly intimated at Bar, when leave was given to file a brief on this side, I now submit without argument any other questions which may attract the attention of the Court in considering the case. *I give up* no question whatever.

III. That the case did not appear to me a proper one for the infliction of a *penalty*—that the Plaintiff in Error's litigation here did not appear to me, in any sense, marked by frivolty—was intimated at the Bar. I now adhere to the opinion I then intimated, and I ask the Court to carefully consider the questions raised by the Assignments of Error.

R. B. WARDEN,
(with S. W. JOHNSTON,)
for Plaintiff in Error.